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NEPA CONSIDERATIONS IN DEPARTMENT OF THE
ARMY PROCUREMENT OF CONSTRUCTION

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views or either the Judge Advocate General's School, The United States Army, or any other government agency.

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NEPA CONSIDERATIONS IN THE DEPARTMENT OF THE
ARMY PROCUREMENT OF CONSTRUCTION

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ABSTRACT

The procurement of construction involves the integration of the National Environmental Policy Act with Army construction planning and programming regulations and the Federal Acquisition Regulations. Unfortunately, there is no single source which provides a basic guide to their integration. Consequently, too often a disconnect occurs between those who either understand only the environmental aspects of, or those who understand only understand the procurement aspects of, a proposed construction project. The National Environmental Policy Act and its implementing regulations require, in pertinent part, the Department of the Army to conduct an environmental analysis and document the results as part of the planning process. Once a construction proponent completes the planning process, it must program the construction, i.e., have the project approved and funded. Subsequently, the proponent must contract for the construction in accordance with a written acquisition plan drafted pursuant to the Federal Acquisition Regulation. The disconnect manifests itself in a situation in which those involved in the environmental analysis and documentation fail to provide enough detail to enable contracting officers to reduce the matters contained therein into specific contract requirements. The genesis of the problem is not with the various authorities, i.e., if the construction proponent follows their requirements the problem will not exist. Rather, the origin of the problem stems from those who are responsible for the environmental analysis and documentation failing to appreciate that the matters contained therein will ultimately have to be reduced to specific contract requirements. Part of the problem is that Judge Advocates who are reviewing the analysis and documentation lack the same appreciation. This thesis reviews the salient provisions of the applicable authorities, identifies how they interrelate, reveals the various problems associated with the disconnect, serves as a basic guide to show Judge Advocates reviewing environmental analysis and documentation how the applicable authorities interrelate which will enable them to provide advice that will avoid the disconnect, and proposes solutions to the disconnect.

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I. Introduction

The environmental considerations for construction¹ are numerous. Construction, directly and indirectly, impacts both the physical (e.g., ground, air, water, animals and vegetation) and non-physical (e.g., social, economic, and cultural) aspects of our environment. The severity of the impact that construction has on the environment is a matter of degree.

Since the passage of the National Environmental Policy Act of 1969², Department of the Army (hereinafter, DA) construction planners and decisionmakers have been required by every level of higher authority (e.g., the President, Congress, Department of Defense and DA) to consider the impact of their construction projects on the environment. This consideration is the essence of NEPA.

NEPA sets forth our national environmental policy which requires Federal agencies to identify environmental values and

¹. DEP'T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION, para. 2-3 (C6, 30 Aug. 1994) [hereinafter AR 415-15], defines construction as follows:

- (a) The erection, installation or assembly of a new facility.
- (b) The acquisition, expansion, extension, alteration, conversion or replacement of an existing facility.
- (c) The relocation of a facility from one installation to another.
- (d) Installed equipment made a part of the facility, related site preparation, excavation, filling, landscaping or other land improvements.

². National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970) [hereinafter NEPA].

amenities, consider them along with economic and technical factors, and, in those situations in which a proposed action will significantly impact the environment, draft a detailed statement. Prior to drafting this statement, the action proponent must consult with appropriate Federal agencies. State and local agencies are notified and invited to submit their views and comments as well.

The detailed statement must address, inter alia, the environmental impact and alternatives that mitigate or avoid the impact. Once drafted, copies of the statement and comments must be made available to the President, the Council on Environmental Quality (created by NEPA, inter alia, to oversee compliance and issue implementing regulations) and the public. Finally, the detailed statement must accompany the proposal through the existing agency review process.

The Council on Environmental Quality (hereinafter, CEQ) issued binding implementing regulations that set forth a framework of procedures that Federal agencies must follow to satisfy the above requirements.³ The CEQ regulations require Federal agencies to augment the framework with their own supplemental procedures consistent with their mission. The

³. REGULATIONS FOR IMPLEMENTING THE PROCEDURAL PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT, 40 C.F.R. §§ 1500-1508 (1995) [hereinafter CEQ regulations].

CEQ regulations refer to the NEPA compliance procedures as the "NEPA process."⁴

The prescribed NEPA process involves elements of: (1) NEPA and agency planning -- using identified environmental amenities and values to determine when and whether to prepare a detailed statement, and involving the agencies identified in NEPA in the determination process; (2) statutory requirements and format for the detailed statement; (3) receiving comments on the draft detailed statement; (4) NEPA and agency decisionmaking -- final detailed statement, including comments considered by decisionmakers, and releasing the decision to the public.

Neither NEPA nor the CEQ regulations identify specific provisions for construction. Additionally, neither address how the NEPA process should be specifically integrated with the Federal Acquisition Regulations planning procedures.

The Army NEPA implementing regulation, Department of the Army Regulation 200-2, Environmental Effects of Army Actions, incorporates the NEPA process, and, as required, prescribes supplemental procedures.⁵ With respect to the integration of NEPA into Army planning, the CEQ regulations require the Army to implement supplemental procedures that identify whether the proposal fits into one of three categories; all keyed to the

⁴. CEQ regulations, *supra* note 3, § 1508.21.

⁵. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, (C2, 23 Dec. 1988) [hereinafter AR 200-2].

pivotal determination of whether a detailed statement should be prepared based upon the consideration of identified environmental values and amenities.

The three categories include proposed actions that: (1) normally require a detailed statement; (2) normally do not require a detailed statement; or (3) if the proposed actions do not fit into these two categories, normally require an environmental assessment to determine if a detailed statement is needed. AR 200-2 establishes separate lists for each category. For proposed actions that do not fit into any of these categories, the CEQ regulations require the Army to establish criteria for making a "proposal by proposal" determination as to whether the proposed action requires a detailed statement, does not require a detailed statement, or requires an environmental assessment to determine whether a detailed statement is required.

Additionally, AR 200-2 addresses: (1) the statutory requirements and format for the draft and final detailed statement; (2) the receipt of comments and views on the draft statement; (3) the consideration of the draft statement and comments by decisionmakers; and, (4) the release of the decision to the public.

Unfortunately, like NEPA and the CEQ regulations, although AR 200-2 lists certain construction projects as normally falling into one of the categories, it does not contain specific provisions for construction. In addition, it

does not address how the NEPA process should be specifically integrated with the Federal Acquisition Regulations planning procedures. Rather, AR 200-2 merely refers users to separate Army regulations that govern construction planning and programming and, in doing so, states that construction decisionmakers, planners, designers and implementers should integrate NEPA into their planning and programming.

Under the Army construction planning regulation, AR 210-20, Master Planning for Army Installations,⁶ absent emergency, the construction of a new facility must be incorporated into the Installation Master Plan. This plan is the official statement of the installation's long-range construction plans. It identifies construction projects that will be required beyond the ensuing five years in order to meet the installation's mission requirements.

AR 210-20 also requires installations to prepare and attach to the Installation Master Plan the installation's Capital Improvement Program. The documents and attachments that comprise the Capital Improvement Program, are the official statement of the installation's short-range plans (i.e., the immediate five years). The Capital Improvement Program identifies the construction projects that the installation has selected, on a priority basis from the pool of long-range plans, the projects that need to be built within

⁶. DEP'T OF ARMY, REG. 210-20, MASTER PLANNING FOR ARMY INSTALLATIONS (12 June 1987) [hereinafter AR 210-20].

the immediate five years in order to meet mission requirements.

Once the installation identifies the short-range construction projects, it must begin the programming process prescribed by the Army construction programming regulation, AR 415-15, Army Military Construction Program Development and Execution.⁷ Construction programming, which takes a minimum of five years, is the process whereby the short-range projects are forwarded through Army, Department of Defense (hereinafter, DOD) and Office of Management and Budget (hereinafter, OMB) channels, reviewed at each level, and, if approved, ultimately submitted to Congress for authorization and funding. Once funding is obtained, the contracting officer must proceed with contract solicitation. Prior to issuing the contract, the contracting officer must draft specifications and a statement of work which tell contractors what they must do and how they should do it to satisfy contractual requirements.

Unfortunately, neither AR 210-20, Master Planning for Army Installations nor AR 415-15, Army Military Construction Program Development and Execution inform users how to integrate planning and programming with the planning procedures prescribed by the Federal Acquisition Regulations.⁸

⁷. AR 415-15, *supra* note 1 (C6, 15 Aug. 1994).

⁸. GENERAL SERVS. ADMIN. ET AL, FEDERAL ACQUISITION REG. PT. 7 (3 July 1995) [hereinafter FAR].

Both specifically address construction and require the NEPA process to be followed; however, they merely refer the reader to the Army NEPA implementing regulation, i.e., AR 200-2.

In support of the Army planning regulation, i.e., AR 210-20, Master Planning for Army Installations, Headquarters DA and the U.S. Corps of Engineers have issued guidance on how to conduct environmental analysis, respectively, DA Pamphlet 200-1, Handbook for Environmental Impact Analysis,⁹ and Technical Report N-130, Procedures for Environmental Impact and Analysis and Planning.¹⁰ However, the guidance in these sources fails to explain how the environmental analysis should be integrated with the planning prescribed by the FAR.

The FAR requires installations to conduct procurement planning and reduce such effort to a written acquisition plan. As part of the written plan, the drafter must address the results of the NEPA process. Unfortunately, the FAR merely references the NEPA process and does not indicate how the NEPA process should be integrated with acquisition planning.

As can be gleaned from the aforementioned, no single authority provides a guide to integrating the NEPA and procurement processes. On the one hand, although both the CEQ and the Army's NEPA implementing regulations generally

⁹. DEP'T OF ARMY, PAMPHLET 200-1, ENVIRONMENTAL QUALITY, HANDBOOK FOR ENVIRONMENTAL IMPACT ANALYSIS, (1 Apr. 1975) [hereinafter DA PAMPHLET 200-1].

¹⁰. CONSTRUCTION ENGINEERING RESEARCH LABORATORY, UNITED STATES ARMY CORPS OF ENGINEERS, TECHNICAL REPORT N-130 (1 Oct. 1982) [hereinafter TECHNICAL REPORT N-130].

identify what planners and decisionmakers must do to comply with NEPA, neither specifically addresses construction procurement planning and programming; on the other hand, although the FAR and the Army's construction planning and programming regulations address construction planning, programming and execution, they merely reference the NEPA process without specifically addressing how NEPA should be integrated.

One would expect that this problem might manifest itself in a situation in which Judge Advocates, who usually do not have any hands-on duty experience with both the NEPA and procurement processes, will not be able to thoroughly integrate the NEPA and procurement processes and provide advice thereon without a significant "networking" and research effort.

As I conducted my own networking effort in preparation for this paper, I contacted Judge Advocates whose duty positions involved either the NEPA or the procurement disciplines. In all cases, none had a working knowledge of how to integrate the NEPA and procurement processes and referred me to another Judge Advocate who worked in the opposing discipline.

One purpose of this thesis is to bridge this apparent gap. My goal is to provide a single source that provides a basic framework of how the applicable NEPA, planning and programming and procurement authorities interrelate. To

accomplish this, I will present the salient provisions of NEPA and the procurement authorities and identify how and when they are integrated. Another purpose of this thesis is to bridge an information gap that exists between those who participate in the NEPA process and those who participate in the procurement process. NEPA requires the Army to incorporate the NEPA process into planning and decisionmaking as early as possible. As previously discussed, from the time the installation commander identifies the need for a new construction project, incorporates it into the long-range plans, advances it into the short-range plan and programs it, at a minimum, five years will have passed before the contracting officer drafts the contract specifications and statement of work.

The NEPA process requires an agency to document both the environmental impact of a proposed action and any mitigation measures designed to avoid or minimize that impact. Inherently, the information on which the environmental documents are based should not dissipate with the passage of time and should be readily available throughout the process. However, on many occasions, those preparing the environmental documents do not identify with sufficient detail the steps that must be taken to implement the mitigation measures and other matters addressed in the environmental documents.

This does not present a problem for contracting officers, who must draft contract requirements for the mitigation

measures and other matters, so long as the preparers are available, recall what steps they had in mind to implement the mitigation measures, and are able to provide this information to contracting officers. However, on occasion, due to the military assignment cycle and the mobility of civilians, those involved in identifying the mitigation measures and other matters are not available after the completion of the five-year programming cycle to assist contracting officers.

In this thesis, I will propose a solution to this information gap. To accomplish this, I will first identify the pertinent provisions of NEPA and the procurement authority. Subsequently, I will propose amendments to them designed to ensure a smooth transition between construction, planning and execution. The goal is to prevent future disconnects between the NEPA and procurement disciplines.

As stated above, in order to achieve both this goal and the goal of providing Judge Advocates with a single source for the integration of the NEPA and procurement processes, I will identify the pertinent provisions of both the NEPA and procurement authorities and related sources. I will begin by providing a brief overview of the primary authorities to assist the reader in putting the various authorities in context as the paper is read. Subsequently, I will present the key provisions of the authorities and related sources that impact construction, identify how they interrelate, reveal pitfalls and propose solutions.

II. Authorities and Sources

Army construction planners and decisionmakers must comply with numerous authorities in order to procure construction in compliance with NEPA. The diagram below portrays these principal authorities and sources of materials available to planners and decisionmakers. A brief description of each is provided on the ensuing pages.

	NEPA	
	"	
	"	
	CEQ Regulations	
	"	
	"	
	DOD Directive 6051.1	
	"	
	AR 200-2-----	Manuals:
	"	DA Pam 200-1
	"	TR N-130
	"	
	"	
AR 210-20-----	AR 415-15-----	AR 415-18
"	"	
"	"	
Manual:	"	
TM-803-1	"	
	FAR	

The first item on the diagram is the NEPA statute. NEPA declared our national environmental policy and created, within the Executive Office of the President, the CEQ. NEPA required the CEQ, inter alia, to issue procedures implementing NEPA. In declaring the national environmental policy, Congress identified federal agency responsibilities and environmental goals.

To ensure that Federal agencies meet these responsibilities and achieve these goals, Congress prescribed action-enforcing mechanisms. One such mechanism is the requirement that Federal agencies identify and consider environmental factors along with technical and economic factors in the planning and decisionmaking process. In this regard, NEPA requires federal agencies to: (1) integrate the use of the natural and social sciences and the environmental design arts into planning and decisionmaking; and (2) identify and develop methods and procedures that require decisionmakers to consider environmental factors along with economic and technical considerations.

The other action-enforcing mechanism is the requirement that Federal agencies issue a detailed statement for activities that might "significantly" impact the environment. NEPA requires the detailed statement to identify each of the following:

- (1) the environmental impact of the proposed action;
- (2) unavoidable adverse effects;

- (3) alternatives to the proposed action;
- (4) the relationship between local short term uses and long term productivity; and
- (5) irreversible and irretrievable commitment of resources (e.g., clearing trees to construct a barracks).

Additionally, in preparation of the detailed statement, NEPA requires a Federal agency to coordinate and receive comments from appropriate Federal, State, and local agencies and public and private organizations. NEPA further requires a Federal agency both to make the detailed statement and comments available to the public and to consider them in the agency decisionmaking process.

The next item on the diagram represents the CEQ's implementing regulations. The stated purpose of these regulations is to inform Federal agencies what actions are necessary to comply with the procedures and to achieve the goals set forth in NEPA. These regulations are generic in nature and purport to provide a framework from which each Federal agency is required to create supplemental procedures tailored to its mission.¹¹

The principle focus of these regulations is to set out a framework of procedures that infuse the consideration of environmental factors into planning and decisionmaking. To ensure that this takes place, the CEQ regulations require

¹¹. Dinah Bear, Nuts and Bolts of Procedural Compliance with the National Environmental Policy Act, A.L.I.- A.B.A. Continuing Legal Education, C981 ALI-ABA 343 (1995).

Federal agencies to issue supplemental planning and decisionmaking procedures that provide, inter alia, for the following:

(1) the identification of environmental values and effects;

(2) the solicitation of input from other federal agencies, state and local agencies, private organizations and individuals to identify environmental values;

(3) the determination of whether the identified environmental effects of an activity are significant or non-significant;

(4) the establishment of specific criteria for and identification of those typical classes of actions that normally do not to have a significant impact on the environment -- termed "categorical exclusions;"

(5) the establishment of specific criteria for and identification of those typical classes of actions that normally do have a significant impact on the environment -- termed "environmental impact statement," which is synonymous with the term "detailed statement" used in NEPA;

(6) the establishment of specific criteria for and identification of those typical classes of actions that normally do not require either a categorical exclusion or an environmental impact statement -- termed "environmental assessment;"

(7) the preparation of a "finding of no significant impact" if the environmental assessment shows that the activity will not have a significant impact on the environment;

(8) the preparation of an environmental impact statement if the environmental assessment shows that the activity will have a significant impact on the environment;

(9) the conduct of "scoping" when a Federal agency must prepare an environmental impact statement. Scoping is a process whereby a Federal agency coordinates with appropriate Federal, State, and local agencies, public and private organizations and individuals, to determine significant environmental issues that must be addressed in the environmental impact statement;

(10) the consideration of categorical exclusions, environmental assessments and environmental impact statements by Federal agency planners and decisionmakers; and

(11) the publication of the decision relative to either an environmental assessment or an environmental impact statement.

The third item in the diagram is DOD Directive 6051.1, Environmental Effects in the United States of DoD Actions.¹² This directive required, in pertinent part, all military

¹². DEP'T OF DEFENSE, DIRECTIVE 6050.1, ENVIRONMENTAL EFFECTS IN THE UNITED STATES OF DoD ACTIONS (30 July 1979).

departments to issue supplemental procedures in accordance with NEPA and the CEQ regulations.

The fourth item is AR 200-2.¹³ This regulation sets forth the DA supplemental NEPA procedures. In doing so, it identifies DA environmental policy, assigns responsibilities, and addresses actions that planners and decisionmakers must take with respect to categorical exclusions, environmental assessments, and environmental impact statements.

The diagram portrays two documents that are associated with AR 200-2, DA Pamphlet 200-1, Handbook for Environmental Impact Analysis,¹⁴ and Technical Report N-130, Procedures for Environmental Impact and Analysis and Planning.¹⁵ These sources assist Army users in the preparation and review of environmental assessments and environmental impact statements.

DA Pamphlet 200-1, includes a section devoted to construction.¹⁶ Additionally, it contains a chapter that identifies and describes the various matter that constitute the environment (i.e., air, water, land, ecology, sound, human, and the economy) including attributes of each (e.g. attributes of the air include particulates, sulphur oxide,

¹³. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, (C2, 23 Dec. 1988) [hereinafter AR 200-2].

¹⁴. DA PAMPHLET 200-1, *supra* note 9.

¹⁵. TECHNICAL REPORT N-130, *supra* note 10.

¹⁶. DA PAMPHLET 200-1, *supra* note 9, p. 33.

hydrocarbons, etc.).¹⁷ Technical Report N-130, issued by the U.S. Corps of Engineers, lists procedures to follow when conducting environmental assessments and environmental impact statements for construction projects.¹⁸

The next item on the diagram is AR 210-20, Master Planning for Army Installations.¹⁹ This regulation sets forth the procedures both for the development of the Installation Master Plan, which is the official statement of an installation's long-range construction plans (beyond the immediate five years), and for the development of the Capital Improvement Program, which is prepared as an adjunct to the Installation Master Plan and is the official statement of the installation's short-range construction plans (within the immediate five-year period).

The ultimate products of the Installation Master Plan and Capital Improvement Program are, respectively, the Future Site Development Map which identifies and indicates the pinpoint sites of the facilities that the installation plans to build beyond the immediate five-year period, and the Project Phasing Map which identifies and depicts the pinpoint sites of projects to be built within the immediate five-year period.

When developing the Installation Master Plan, AR 210-20 requires installations to use the NEPA process to ascertain

¹⁷. DA PAMPHLET 200-1, *supra* note 9, app. A.

¹⁸. TECHNICAL REPORT N-130, *supra* note 10.

¹⁹. AR 210-20, *supra* note 6.

the collective environmental impact of the entirety of all future development.²⁰ On the above diagram, Technical Manual 5-803-1, Installation Master Planning,²¹ is associated with AR 210-20. This manual, in addition to informing installations how to develop the Installation Master Plan, provides installations with guidance on how prepare an environmental assessment for the Installation Master Plan. When developing the Capital Improvement Program, AR 210-20 requires the installation to use the NEPA process to ascertain the environmental impact that each individual project has on the environment.

The next item on the diagram is AR 415-15, Army Military Construction Program Development and Execution.²² This regulation prescribes the procedures, inter alia, for the approval and funding of short-range projects identified in the Capital Improvement Program. In furtherance of the Capital Improvement Program, AR 415-15 requires installations to complete DD Form 1391-EF, which provides background information, including a reference to any applicable environmental assessment or environmental impact statement to be considered in the approval process.

²⁰. AR 210-20, *supra* note 6, para. 4-7(1).

²¹. DEP'T OF ARMY, TECHNICAL MANUAL 5-803-1 (1 Oct. 1989).

²². AR 415-15, *supra* note 1 (C6, 15 Aug. 1994).

The next item is AR 415-18, Military Construction Responsibilities.²³ This regulation identifies the U.S. Corps of Engineers, as the agency responsible for the design and construction of Army military facilities. Military installations coordinate the development of long-range project plans and coordinate the design, development and execution of short-range projects with the U.S. Corps of Engineers.

The final item is the FAR. FAR, Part 7, "Acquisition Planning," sets forth procurement planning requirements.²⁴ This part includes a provision that requires planners to address environmental assessments and environmental impact statements when planning procurements.

Judge Advocates faced with a legal issue that requires the integration of NEPA with the construction planning and procurement processes should initially assemble the aforementioned authorities and sources. When doing so, Judge Advocates should be cognizant that AR 200-2 contains reprints of NEPA and the CEQ regulations in separate appendices. To obtain copies of Technical Report N-130, Procedures for Environmental Impact and Analysis and Planning²⁵ and Technical Manual 5-803-1, Installation Master Planning,²⁶ Judge Advocates

²³. DEP'T OF ARMY, REG. 415-18, MILITARY CONSTRUCTION RESPONSIBILITIES (1 Dec. 1982) [hereinafter AR 415-18].

²⁴. FAR, *supra* note 8.

²⁵. TECHNICAL REPORT N-130, *supra* note 10.

²⁶. TM 5-803-1, *supra* note 21.

should contact such sources as either the supporting Directorate of Public Works or U.S. Corps of Engineer Division Office, or the military documents section of the Pentagon Library.

For Judge Advocates unfamiliar with both the NEPA and construction procurement processes the best source to initially consult, in order, are DA Pamphlet 200-1, Handbook for Environmental Impact Analysis,²⁷ Technical Report N-130, Procedures for Environmental Impact and Analysis and Planning²⁸ and Technical Manual 5-803-1, Installation Master Planning.²⁹ Together, these reports identify in non-technical language the basics of NEPA analysis and construction planning. Once read, Judge Advocates should read FAR, Part 7, Acquisition Planning.³⁰ At this point, Judge Advocates will have a basic understanding of how NEPA and the construction planning and procurement processes interrelate before turning to the CEQ regulations and AR 200-2 which apply to all types of planning and decisionmaking.

III. The National Environmental Policy Act of 1969³¹

On 1 January 1970, President Richard M. Nixon signed NEPA into law. NEPA sets forth our basic national charter for the

²⁷. DA PAMPHLET 200-1, *supra* note 9.

²⁸. TECHNICAL REPORT N-130, *supra* note 10.

²⁹. TM 5-803-1, *supra* note 10.

³⁰. FAR, *supra* note 8.

³¹. NEPA, *supra* note 2.

protection of the environment. Congress identified the purpose of NEPA as follows:

To declare a national policy which will encourage a productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and **to establish a Council on Environmental Quality.**³² (Emphasis added.)

Congress divided NEPA into two titles. In Title 1, Congress declared our national policy, identified national environmental values and amenities, set forth environmental goals and delineated responsibilities.³³ Additionally, to ensure that Federal agencies carried out the national policy, Congress prescribed action-enforcing mechanisms.³⁴ In Title 2, Congress created, within the Executive Office of the President, the CEQ to, inter alia, set forth NEPA implementing procedures.³⁵ Congress declared our national environmental policy as follows:

Sec. 101. (a) **The Congress**, recognizing the profound impact of man's activity on the interrelations of all components of the natural

³². NEPA, *supra* note 2, § 4321.

³³. NEPA, *supra* note 2, § 4331.

³⁴. NEPA, *supra* note 2, § 4332.

³⁵. NEPA created the CEQ in the Executive Office of the President, required it to be composed of three members who "shall be appointed by the President to serve at his pleasure by and with the consent of the Senate," and required such members, inter alia, "to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation." NEPA, *supra* note 2, § 4342.

environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man **declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures**, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, **to create and maintain conditions under which man and nature can exist in productive harmony** and to fulfill the social, economic, and other requirements of present and future generations of Americans. . . . (Emphasis added.)

In order to carry out the policy set forth in this Act, it is the continuing **responsibility** of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources **to the end that** the Nation may--

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and aesthetical and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.³⁶

As provided above, Congress also set forth action-enforcing mechanisms. Congress prescribed these mechanisms to ensure that the Federal agencies "act according to the letter and spirit of [NEPA]."³⁷ One such mechanism is the requirement that a Federal agency infuse environmental considerations into its planning and decisionmaking processes by:

(a) Utiliz[ing] a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in **planning and in decisionmaking** which may have an impact on man's environment; [and]

(b) Identify[ing] and develop[ing] methods and procedures, in consultation with the [CEQ] . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in **decisionmaking** along with economic and technical considerations. . . .³⁸

Another mechanism, which builds upon the first, is the requirement that a Federal agency do the following if it determines that an action will "significantly" effect the quality of the environment:

(c) Include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a **detailed statement** by the responsible official on--

(i) The environmental impact of the proposed action.

³⁶. NEPA, *supra* note 2, § 4331.

³⁷. CEQ regulations, *supra* note 3, § 1500.1.

³⁸. NEPA, *supra* note 2, § 4332.

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall **consult with and obtain the comments of any Federal agency** which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statements and the **comments and views of the appropriate Federal, State, and local agencies**, which are authorized to develop and enforce environmental standards, **shall be made available** to the President, the [CEQ] and to the public as provided by [the Freedom of Information Act], and **shall accompany the proposal through the existing agency review processes.** (Emphasis added).³⁹

Although NEPA includes these action-enforcing provisions, it does not require Federal agencies to elevate environmental concerns over other concerns, i.e., technical and economic concerns.⁴⁰ NEPA only requires that a Federal agency adequately identify and evaluate the environmental effects of a proposed action before proceeding with an action.⁴¹

³⁹. NEPA, *supra* note 2, § 4332.

⁴⁰. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

⁴¹. "[I]f the adverse environmental effects to the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . NEPA merely
(continued...)

Federal agencies are given broad discretion when weighing environmental factors against either technical or economic factors in their decisionmaking processes.⁴² Even if an action will significantly affect the environment, an agency may still proceed with the action so long as it considered the environmental effects of the action in its planning and decisionmaking process. The bottom line is that NEPA does not create substantive environmental rights; rather, it is a procedural statute designed to ensure that decisions about Federal actions are made only after responsible planners and decisionmakers have fully considered the environmental consequences of an action by following the outlined procedures.⁴³

Having said this, an action proponent must remain aware of the broad-brush approach NEPA prescribes for those actions that will significantly affect the environment, i.e., in every case the agency proponent must prepare a detailed statement. In construction actions, usually the Directorate of Public Works (hereinafter, DPW) is the action proponent and,

⁴¹(...continued)
prohibits uninformed -- rather than unwise -- agency action."
Id. at 348.

⁴². "[I]f the adverse environmental effects to the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . NEPA merely prohibits uninformed -- rather than unwise -- agency action."
Id. at 343.

⁴³. Jones v. District of Columbia Redev. Land Agency, 499 F.2d 502 (D.C. Cir. 1974), cert. denied, 423 U.S. 937 (1975).

therefore, responsible for the preparation of the detailed statement.

In practice, DPW usually provides in the detailed statement that the installation will take certain mitigation measures designed to either avoid altogether (e.g., clean wastewater runoff originating from the building before it enters a stream), reduce (limit the amount of pesticide or herbicide to be placed on the building landscape) or compensate for (e.g., create a substitute habitat for an endangered species to replace the area on which a building will be constructed) the significant impact of a construction project. However, in doing so, DPW often times describes the mitigation measures generically (e.g.,⁴⁴ we will protect the stream from wastewater runoff from the new building) rather than specifically (e.g., we will protect stream x by building x number of leach beds constructed of x materials, x number of yards from the stream, etc.). The problem with this approach is that it can lead to situations in which decisionmakers make decisions upon the generic measures, only to find out later that implementing the measures may be impractical (e.g., too costly or not technically feasible).⁴⁵

⁴⁴. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, (C1, 23 May 1990) [hereinafter AR 200-1], paras. 6-5 - 6-6.

⁴⁵. Interview with J. Phil Huber, Assistant for Pollution Prevention and Conservation, Office, Assistant Secretary of the Army (Installation, Logistics and Environment), at the Pentagon, Washington, D.C., (Feb. 26, 1996). [hereinafter (continued...)]

When these situations occur, arguably, DPW has not met the NEPA "detailed" statement requirement. The United States Supreme Court interprets this requirement as one in which the action proponent must take a "hard look" at environmental consequences.⁴⁶ If an action proponent, such as DPW, generically identifies mitigation measures to mitigate significant environmental impact without consideration of the practicality of their implementation, the result is a "hypothetical" detailed statement. The United States Supreme Court has found such statements unacceptable.⁴⁷

If a detailed statement prepared by DPW is unacceptable, the installation will have to restart the NEPA process. In practical terms, this could delay a project more than one year.⁴⁸

Both to solve this problem and to avoid its symptom -- having to restart the NEPA process -- Judge Advocates reviewing the detailed statement should ensure that any mitigation measures being proposed to mitigate significant impact should be detailed enough to ensure that implementation is practical. In doing so, Judge Advocates should consult

⁴⁵ (...continued)
Huber interview].

⁴⁶. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

⁴⁷. Foundation on Economic Trends, et. al. v. Caspar Weinberger, et. al., 610 F. Supp. 829 (1985), citing Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143 (1981).

⁴⁸. AR 200-2, *supra* note 5, para. 2-6(g).

with local experts (e.g., technical representatives of the DPW, any Army-contracted consulting firms, on-post environmental specialists, etc.). Additionally, Judge Advocates advising contracting officers should be sensitive to this problem and, if alternative measures to any impractical mitigation measures are conceived but not subjected to the NEPA process, inform contracting officers not to proceed without the completion of the proper NEPA process.

IV. CEQ NEPA Implementing Regulation and AR 200-2

a. Purpose of CEQ Regulations.

On 29 November 1978, the CEQ issued the CEQ NEPA implementing regulations.⁴⁹ These binding regulations: (1) implement the NEPA action-enforcing procedures; (2) inform DA what it must do to comply with these procedures and achieve the goals of NEPA; (3) ensure that DA NEPA procedures make DA environmental information available to public officials and citizens before decisions are made and before actions are taken; (4) ensure that DA bases its environmental information upon accurate scientific analyses, expert agency comments and public scrutiny; (5) ensure that DA NEPA documents focus solely on issues truly significant to the action in question, rather than amassing needless detail; and (6) help DA officials make decisions that are based on understanding of

⁴⁹. CEQ regulations, *supra* note 3, app. E.

the environmental consequences, and take actions that protect, restore, and enhance the environment.⁵⁰

b. Planning Procedures.

The CEQ regulations refer to the NEPA action-enforcing mechanisms as the "NEPA process."⁵¹ The CEQ regulations require DA to integrate the NEPA process into early planning.⁵² This mandate has a twofold objective, first, to ensure that DA planning and decisions reflect environmental values and, second, to avoid delays that could potentially arise later if environmental values are not considered earlier (e.g.,⁵³ construction plans must be reviewed and approved prior to execution; if construction plans are prepared for a location in a noise abatement area, a new location may have to be determined, thereby nullifying previous planning efforts).⁵⁴

To aid DA in integrating the NEPA process, the CEQ regulations set forth a framework of documents and procedures that DA must adopt and issue supplemental procedures tailored to its planning and decisionmaking structure.⁵⁵ The framework of documents and procedures is based upon three possible scenarios: (1) DA has determined that the construction

⁵⁰. CEQ regulations, *supra* note 3, § 1500.1.

⁵¹. CEQ regulations, *supra* note 3, § 1508.21.

⁵². CEQ regulations, *supra* note 3, § 1501.1.

⁵³. AR 200-1, *supra* note 44, ch. 7.

⁵⁴. CEQ regulations, *supra* note 3, § 1501.2.

⁵⁵. CEQ regulations, *supra* note 3, § 1507.3.

activity does not have a significant impact on the environment -- a situation in which a NEPA detailed statement is not required and is termed a "categorical exclusion" (hereinafter, CATEX); (2) DA has determined that the construction activity will have a significant impact on the environment -- a situation requiring a NEPA environmental impact statement⁵⁶ (hereinafter, EIS); or (3) DA needs to determine whether the construction activity will have a significant impact on the environment -- a situation in which DA must conduct an "environmental assessment" (hereinafter, EA) to determine if an EIS is needed.

1. Categorical Exclusions.

With respect to the first scenario, the CEQ regulations define CATEX as follows:

[CATEX] means a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an [EA] nor [EIS] is required. . . .⁵⁷

As implied in the definition, before DA may claim a CATEX, it must first determine that the construction will not have a significant impact on the environment. The CEQ framework requires DA to issue supplemental procedures that establish criteria for and identify those typical classes of

⁵⁶. The CEQ regulations state that the term "environmental impact statement" is synonymous with the detailed statement required by NEPA. CEQ regulations, *supra* note 3, § 1508.11.

⁵⁷. CEQ regulations, *supra* note 3, § 1508.4.

actions that normally require a CATEX.⁵⁸ If a construction activity neither meets the supplemental criteria nor is identified in the supplemental procedures, then DA may not claim a CATEX.

AR 200-2, lists 29 CATEXs and establishes criteria for their use.⁵⁹ Before an installation may claim a CATEX it must determine the proposed action meets the following criteria: (1) the action is not a major federal action significantly affecting the quality of the environment; and (2) there are minimal or no individual or cumulative effects on the environment as a result of the action. AR 200-2 identifies the following construction CATEX:

Construction that does not significantly alter land use, provided the operation of the project when completed would not of itself have a significant environmental impact; this includes grants to private lessees for similar contracts. . . .⁶⁰

AR 200-2 has two requirements. The first requires that a CATEX meet this criteria. In addition, the proponent of the action must issue a "Record of Environmental Consideration" (hereinafter, REC). The REC is a signed statement included with other project documents explaining, inter alia, why further environmental analyses are not needed.⁶¹ Once the REC is completed, the proponent may proceed with planning.

⁵⁸. CEQ regulations, *supra* note 3, § 1507.3.

⁵⁹. AR 200-2, *supra* note 5, app. A.

⁶⁰. AR 200-2, *supra* note 5, app. A, para. A-7.

⁶¹. AR 200-2, *supra* note 5, para. 3-1.

2. Environmental Assessments.

If a proposed action does not fit within a CATEX, the second scenario contemplated by the CEQ regulations may be applicable, i.e., the situation in which an EA is required. The CEQ regulations define EA as follows:

Environmental Assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a FONSI.

(2) Aid an agency's compliance with [NEPA] when no [EIS] is necessary.

(3) Facilitate the preparation of an [EIS] when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives required by [NEPA] section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons contacted.⁶⁵

As the definition indicates, the purpose of the EA is to determine the extent of any environmental impact, and to decide whether or not that impact is significant.⁶⁶ The definition also indicates that the EA is a fairly extensive process requiring environmental data gathering, analyses, and coordination. Finally, the definition shows that the EA may

⁶⁵. CEQ regulations, *supra* note 3, § 1508.9.

⁶⁶. AR 200-2, *supra* note 5, para. 5-1.

result in either the preparation of an EIS or the preparation of FONSI.

A FONSI is a separate document from the EA and is defined as follows:

[FONSI] means a document by a Federal agency briefly presenting the reasons why an action, not otherwise [a CATEX], will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared. It shall include the [EA] or a summary of it. . . .⁶⁷

The CEQ regulations require DA to issue supplemental procedures to identify and set forth criteria for typical classes of actions that normally require EAs.⁶⁸ AR 200-2, ¶ 5-2 sets forth the criteria. The provision requires the installation to prepare an EA when the actions have the "potential" to: (1) harm culturally or ecologically sensitive areas; (2) release harmful radiation or hazardous waste or toxic chemicals; (3) violate pollution abatement standards; (4) take a lengthy duration for completion; or (5) have a cumulative impact⁶⁹ on the environment when combined with other actions.

⁶⁷. CEQ regulations, *supra* note 3, § 1508.13.

⁶⁸. CEQ regulations, *supra* note 3, § 1507.3.

⁶⁹. The CEQ regulations define "cumulative" impact as the "impact on the environment which results from the incremental impact of the action when added to the past, present, and reasonably foreseeable future actions . . ." CEQ regulations, *supra* note 3, § 1508.7.

AR 200-2, ¶ 5-3, lists the following typical classes of construction or construction related actions that normally require an EA:

b. Military construction, including contracts for off-post construction.

* * *

d. Changes to established land use that generates impacts on the environment.

* * *

f. Repair or alteration projects affecting historically significant structures, archaeological sites, or places on, or meeting, the criteria for nomination to the National Register of Historic Places.

* * *

h. Actions that could potentially cause soil erosion, affect prime or unique farmland, wetlands, floodplains, coastal zones, wilderness areas, aquifers or other water supplies, or wild and scenic rivers.

* * *

q. An activity that affects any species on, or proposed for, the U.S. Fish and Wildlife Service list of Threatened and Endangered Plant and Animal Species. Also activities affecting any species on an applicable State or territorial list of threatened or endangered species.⁷⁰

If the installation determines that the project either meets the criteria for, or fits into one of the listed actions that normally require the preparation of, an EA, the installation must conduct the EA and document its findings. With respect to the content of the EA, AR 200-2 requires the installation, to include: (1) a brief discussion of the need for the proposed action; (2) a description of the proposed

⁷⁰. AR 200-2, *supra* note 5, para. 5-3.

action; (3) the alternatives considered; (4) the affected environment; (5) environmental consequences of the proposed actions and alternatives; (6) list the agencies and persons consulted; and (7) render a finding that the proposed either will or will not significantly impact the environment.⁷¹

If the installation concludes after conducting the EA that the action will not significantly impact the environment, AR 200-2 requires the installation to issue a FONSI. The installation should normally limit the length of a FONSI to two pages. In drafting this document, the installation should include the name of the action, a brief description of the action, including any alternatives considered, a short discussion of the anticipated environmental effects, the facts and conclusions that led to the FONSI, and a deadline and point of contact for further information or public comment.⁷²

The CEQ regulations authorize Federal agencies to use mitigation measures to eliminate any significant impact and define "mitigation" as follows:⁷³

"Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

⁷¹. AR 200-2, *supra* note 5, para. 5-4(a).

⁷². AR 200-2, *supra* note 5, para. 5-4.

⁷³. CEQ regulations, *supra* note 3, § 1508.20.

(c) Rectifying the impact by repairing, rehabilitating or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

AR 200-2, incorporates this provision⁷⁴ and devotes an entire appendix to mitigation.⁷⁵ In pertinent part, the provisions in Appendix F require installations to define any mitigation measures and include in such definition considerations of military mission, manpower restrictions, cost, institutional barriers, technical feasibility and public acceptance.⁷⁶

Continuing with the mental checklist referenced above, Judge Advocates advising persons responsible for the NEPA process must recognize that the next items in the NEPA mental checklist are, sequentially: (1) checking to see if the proposed action falls within the class of actions identified by AR 200-2 that normally require EA; if so, conduct the EA and determine whether a FONSI is appropriate (i.e., it is determined that there will be no significant impact) or an EIS is appropriate (i.e., it is determined that there is potential significant impact); if not; (2) apply the criteria identified

⁷⁴. AR 200-2, para. 2-7(a).

⁷⁵. AR 200-2, *supra* note 5, app. F.

⁷⁶. AR 200-2, *supra* note 5, app. F, para. F-2(d)(1).

by AR 200-2 to determine if an EA is necessary; if so, determine if the proposed action meets the criteria set forth in AR 200-2 that require an environmental impact and determine whether a FONSI or EIS is required; (3) if a FONSI is appropriate, document the finding and include any mitigation measures used to eliminate any significant impact and continue with the project; and (4) if a finding is made that an EIS is required, continue with the NEPA process.

Judge Advocates, advising persons either responsible for the NEPA or procurement processes, should be aware that a problem currently exists with respect to documenting mitigation measures in FONSIs.⁷⁷ Currently, the common practice is for installations to contract -- through their supporting U.S. Corps of Engineers Division Office -- with private firms to conduct large project EAs, and to perform small project EAs either in-house or through the supporting U.S. Corps of Engineers Division office. The mitigation problem is common to both.

With respect to large project EAs, occasionally, neither DPW, the decisionmaker (i.e., the installation commander), nor the contracting office are informing the private firm exactly what mitigation measures they want and how much they are willing to spend to implement them. As a consequence, from a

⁷⁷. Interview with Tim Julius, Environmental Protection Specialist, Office of the Director of Environmental Programs, Office of the Secretary of the Army, Assistant Chief of Staff (Installation Management), at the Pentagon, Washington, D.C., (Feb. 26, 1996) [hereinafter Julius interview].

practical standpoint, three separate stovepipe entities exist: the U.S. Corps of Engineer Division Office, DPW/installation commander, and the contracting office. This condition has resulted in a disconnect.

The private firms, unaware of the specific mitigation measures that the installation desires, are conceiving their own specific mitigation measures and coordinating the details of implementation with Federal, State and local agencies. However, in drafting the FONSI, they are not writing the details; rather, they are generically describing the implementation of the mitigation measures (e.g., soil traps will be used to control erosion; dust suppression methods will be used to control dust).

Subsequently, the installation, without appreciating the lack of detail, is processing the FONSI through the review and approval and programming processes without specific details respecting how the mitigation measures will be implemented (e.g., a trap will be place at X location, constructed of X, etc., as agreed with State X). Ultimately, the FONSI is given to a contracting officer who must translate the generic mitigation measures into specific contract requirements and must price them.⁷⁸ Consequently, contracting officers, as a practical matter, must consult with the private firm to obtain the details. On certain occasions, once the specific implementing measures are discovered, the installation either

⁷⁸. Julius interview, *supra* note 77.

disagrees with the method of implementation or associated costs. Consequently, at best, the project must be delayed until the method of implementation is resolved, or at worst, if resolution is not possible, the EA must be supplemented.

A similar type disconnect exists with small projects done either in-house, or through the supporting U.S. Corps of Engineers Division office. Persons conducting the EA and preparing the FONSI are not specifically identifying how mitigation measures will be implemented. Unlike the situation in which a private firm is used, contracting officers may not be able, due to military assignment cycles and civilian employee mobility, to ascertain the specifics from those who conducted the EA or prepared the FONSI. As such, contracting officers face a difficult task in reconstructing exactly what specific implementation measures were intended, especially those which were derived from a consensus with outside agencies such as State and local environmental offices. Consequently, at a minimum, the project will be delayed pending the contracting officer's reconstruction efforts.

The genesis of the aforementioned disconnects is not with applicable authority (i.e., Appendix F, AR 200-2, requires installation to define mitigation measures). Rather, the genesis is a failure by those who are merely identifying generic mitigation implementing measures in the FONSI to appreciate that such generic must ultimately be translated into specific contract requirements by a contracting officer.

The next revision to AR 200-2, scheduled to be released this summer, will require those preparing FONSIIs to include these specifics.⁷⁹ This revision should in large measure eliminate the problem. However, Judge Advocates should continue to monitor the situation to ensure that identified mitigation implementing measures are specific enough. In doing so, Judge Advocates should involve contracting officers in the FONSI review and, in cases where the implementing measures are complex, seek input from various on- and off-post technical sources (e.g., Installation Landscape Architect, Installation Environmental Specialist, U.S. Corps of Engineers Environmental Staff, etc.).⁸⁰

As a further solution to the problem, AR 200-2, Appendix F, should be amended. In prescribing procedures for mitigating environmental impact, it encourages those conducting EAs to consult with "experts familiar with the predicted environmental impacts" in order to identify and evaluate mitigation techniques.⁸¹ To assist the reader in this endeavor it lists multiple on- and off-post sources. Although the list includes multiple sources, the installation procurement office is not among them.

In light of the problem, from a logical standpoint, especially in the sense of identifying mitigation techniques,

⁷⁹. Julius interview, *supra* note 77.

⁸⁰. AR 200-2, *supra* note 5, para. F-2.

⁸¹. AR 200-2, *supra* note 5, para. F-2.

the procedures should be amended to require those conducting EAs to consult the installation procurement office. By being involved in the identification process, which occurs prior to the mitigation techniques being incorporated into the FONSI, contracting officers will be able to identify any mitigation implementing measure that is too generic to be reduced to specific contract requirements. Contracting officers are our experts in contract formation and should be consulted in light of this problem.

Judge Advocates involved in the procurement process should ensure that the implementing measures are properly reduced into specific contract provisions. Additionally, Judge Advocates must prevent the contracting officer from approving any contract modification inconsistent with the FONSI (e.g., implementing measures must not be altered). As a prophylactic measure, Judge Advocates might suggest to the contracting officer that a copy of the FONSI itself be attached to contract and incorporated by reference.

Additionally, should a circumstance arise in which it is discovered that the project either will, or might potentially have, a significant impact on the environment, Judge Advocates must advise the contracting officer that work on the project must be suspended pending the conduct of further NEPA analysis. Judge Advocates, in order to shift the risk of additional cost resulting from such a circumstance (i.e., to either avoid or reduce any contractor claim for delay

damages), might suggest to the contracting officer that a contract clause be drafted with the following language:

The mitigation measures set forth in [Specification X] [Statement of Work, Section X] were derived from the FONSI attached as Appendix X and prepared pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (hereinafter, NEPA]. The Contractor agrees to not hold the Government responsible for any reasonable period of delay caused by the discovery of any environmental impacts, not reasonably foreseeable prior to contract award, that require further NEPA analysis. If such a circumstance arises, the Government agrees to pay the Contractor reasonable costs for the demobilization and remobilization of its workforce to the contract site. The contractor agrees that any delay shall be treated as a Suspension of Work pursuant to FAR 52.249-10.⁸²

Once the FONSI is completed, the next step is determined by whether the project is one that must be programmed. If the project must be programmed, the installation proceeds with the programming process discussed below in the "Construction Programming" section. If not, the installation may proceed with the project. The tables at Appendix E provide examples of projects that do and do not have to be programmed.

3. Environmental Impact Statements.

If the proposed action is one that will significantly affect the environment, the installation must prepare and EIS in accordance with the procedures prescribed by the CEQ regulations for the preparation of an EIS. The CEQ regulations, as set forth in by NEPA, require installations to

⁸². Should a portion of the delay be deemed unreasonable, pursuant to this clause, the Government does not have to pay profit on delay damages. FAR, *supra* note 8.

include an EIS in every report on "proposals" for "major Federal actions" "significantly" "affecting" the "human environment."⁸³ The CEQ regulations define these terms as follows:

"**Proposal**" exists at that stage in the development of an action when an agency . . . has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an [EIS] on a proposal should be timed so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal.⁸⁴

"**Major Federal action**" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly. . . . Federal actions [include] . . . approval of specific projects, such as construction. . . .⁸⁵

"**Significantly**" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind

⁸³. CEQ regulations, *supra* note 3, § 1502.3.

⁸⁴. CEQ regulations, *supra* note 3, § 1508.23.

⁸⁵. CEQ regulations, *supra* note 3, § 1508.18.

that more than one agency may make decisions about partial aspects of a major action. . . .⁸⁶

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. . . . This means that economic or social effect are not intended by themselves to require preparation of an [EIS]. When an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated then the [EIS] will discuss all of these effects on the human environment.⁸⁷

The CEQ regulations require DA to issue supplemental procedures that set forth criteria for, and identification of typical classes of actions that normally require, an EIS.⁸⁸

AR 200-2, ¶ 6-2, sets forth DA's prescribed specific criteria. An installation is required to prepare an EIS when the action has the "potential" to: (1) significantly affect environmental quality or public health or safety; significantly affect historic or archaeological resources, public parks, and recreation areas, wildlife refuge, or wilderness areas, wild and scenic rivers, or aquifers; (2) have significant adverse effects on properties listed or meeting the criteria for listing in the National Registry of Natural Landmarks; (3) cause a significant impact to prime and unique farm lands, wetlands, floodplains, coastal zones, or ecologically or culturally important areas or other areas of unique or critical environmental concern;

⁸⁶. CEQ regulations, *supra* note 3, § 1508.23.

⁸⁷. CEQ regulations, *supra* note 3, § 1508.14.

⁸⁸. CEQ regulations, *supra* note 3, § 1507.3.

(4) result in potentially significant and uncertain environmental effects or unique and unknown environmental risks; or

(5) significantly affect a species or habitat listed or proposed for on the Federal list of endangered or threatened species.⁸⁹

In AR 200-2, ¶ 6-3, DA identifies the following classes of construction, or construction related, activities that typically require an EIS:

a. Significant expansion of a military facility, such as a depot, munition plant, or major training installation.

b. Construction of facilities that have a significant effect on wetlands, coastal zones, or other areas of critical importance.

* * *

e. Land acquisition, leasing or other activities that may lead to significant changes in land use.⁹⁰

c. Environmental Impact Statement Procedures.

The CEQ regulations state that the primary purpose of the EIS is to serve as an action-enforcing device to ensure Federal agencies infuse NEPA policies and goals into their programs and actions. To assist Federal agencies in drafting appropriate EISs, the CEQ regulations set forth the following standard format Federal agencies are required to use: (1) cover sheet; (2) summary; (3) table of contents; (4) purpose

⁸⁹. AR 200-2, *supra* note 5, para. 6-2. Other criteria are listed but, for the sake of brevity, are not listed.

⁹⁰. AR 200-2, *supra* note 5, para. 6-3.

of and need for the action; (5) alternatives including the proposed action; (6) list of preparers; (7) list of agencies; (8) organizations and persons to whom copies of the statement were sent; (9) index; and (10) appendices, if any.⁹¹ DA incorporated this standard format in AR 200-2, ¶ 6-4.⁹²

In addition to prescribing a standard format, the CEQ regulations set forth a framework of procedures for preparing EISs and require Federal agencies to adopt and augment them with supplemental procedures.⁹³ Initially, Federal agencies must prepare a draft EIS.⁹⁴

The preparation of a draft EIS is prepared after a process commonly known as "scoping" is completed. The CEQ regulations define "scope"⁹⁵ as follows:

Scope consists of the range of actions, alternatives and impacts to be considered in the [EIS]. . . . To determine scope of [EISs], agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) **Actions** . . . which may be: (1) Connected actions, that are closely related and should be discussed in the same impact statement. . . (2) Cumulative actions, when viewed with other proposed actions, have cumulative impacts and should be discussed in the same impact statement. (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency action, have similarities that provide a basis for evaluating

⁹¹. CEQ regulations, *supra* note 3, § 1502.10.

⁹². AR 200-2, *supra* note 5.

⁹³. CEQ regulations, *supra* note 3, pt. 1502.

⁹⁴. CEQ regulations, *supra* note 3, § 1502.9.

⁹⁵. CEQ regulations, *supra* note 3, § 1508.25.

their environmental consequences together, such as common timing or geography.

(b) **Alternatives** which include: (1) No action alternative. (2) Other reasonable courses of action. (3) Mitigation measures (not in the proposed action).

(c) **Impacts**, which may be (1) Direct; (2) Indirect; (3) Cumulative. (Emphasis added.)

As a first step in the scoping process, Federal agencies must prepare a "notice of intent." This notice informs persons and entities outside the agency that it intends to prepare a draft EIS.⁹⁶ The CEQ regulations define "notice of intent" as follows:

"Notice of intent" means a notice that an EIS will be prepared and considered. The notice shall briefly: (a) Describe the proposed action and proposed alternatives. (b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held. (c) State the name and address of a person who can answer questions about the proposed action and the [EIS].⁹⁷

DA incorporated this definition almost verbatim in AR 200-2, ¶ 3-1(d). Additionally, AR 200-2, ¶ 7-3, requires installations, when drafting the notice of intent document, to identify the following: (1) the significant issues to be analyzed in the EIS; (2) the office or person responsible for matters related to the scoping process; (3) both the lead (usually the installation) and any cooperating agency, if already determined; (4) the method by which the agency will

⁹⁶. CEQ regulations, *supra* note 3, § 1501.7.

⁹⁷. CEQ regulations, *supra* note 3, § 1508.22.

invite participation of affected parties; (5) a tentative list of the affected parties to be notified; and (6) the proposed method for accomplishing the scoping procedure.

AR 200-2, ¶ 7-3, requires installations to indicate in the notice of intent document the relationship between the timing of the preparation of environmental analyses and the tentative planning schedule and decisionmaking schedule including: (a) the scoping process itself, (b) collecting or analyzing environmental data, including studies required of cooperating agencies, (c) preparation of draft and final EISs; (d) filing of the record of decision; and (e) taking the proposed action.

In addition to prescribing the content of the notice of intent document, AR 200-2 sets forth publication requirements. Installations must publish the notice of intent document in local newspapers and to forward it through the Office of the Assistant Chief of Staff, Installation Management, to the Deputy for Environment, Safety and Health, for ultimate publication in the Federal Register.⁹⁸ AR 200-2 further requires installations to disseminate the notice of intent, via such means as news releases, to local and installation communities.⁹⁹

After satisfying the notice of intent requirements, the CEQ regulations require DA to invite the participation of the

⁹⁸. AR 200-2, *supra* note 3, para. 6-5.

⁹⁹. AR 200-2, *supra* note 5, para. 7-1(a)(1).

following entities and persons in the scoping process: (1) affected Federal, State and local agencies; (2) any affected Indian tribe; and (3) other interested persons or organizations (e.g., respondents to the notice of intent).¹⁰⁰

AR 200-2, ¶ 7-4, incorporates these requirements and additionally calls for the participation of: (1) technical representatives of the construction proponent (usually engineers from DPW) who are able to describe the technical aspects of the proposed action and alternatives to other participants; (2) at least one representative of any DA-contracted consulting firm retained to write the EIS or provide reports that DA will use to create substantial portions of the EIS; and (3) experts knowledgeable in those environmental fields in which impacts are expected.

The CEQ regulations require DA to make available all information obtained or generated prior to the conduct of the scoping session.¹⁰¹ DA incorporated this requirement in AR 200-2, ¶ 7-4(c). This provision further requires installations to provide as much of the following information as possible:

(1) A brief description of the environment at the affected location. . . .

(2) A description of the proposed alternatives. The description will be sufficiently detailed to enable evaluation of the range of impacts that may be

¹⁰⁰. CEQ regulations, *supra* note 3, § 1501.7(a).

¹⁰¹. CEQ regulations, *supra* note 3, § 1506.6.

caused by the proposed action and alternatives. . .

* * *

(4) Any additional scoping issues or limitations on the [EIS], if not already described. . . .

Following the dissemination of both the notice of intent and the information pertinent to the preparation of the draft EIS, the CEQ regulations require DA to consider input from all sources. Additionally, the CEQ regulations authorize DA to conduct early scoping meetings.¹⁰² DA addressed these CEQ provisions in AR 200-2.¹⁰³

With respect to scoping meetings, AR 200-2, ¶ 7-4(d) provides the following:

[T]he purpose of the scoping meeting is to be an informal public meeting. It is a working session where the gathering and evaluation of information relating to potential environmental impacts can proceed.

As a final step in the scoping process, the CEQ regulations require DA to use information and evaluations resulting from the scoping meeting and preliminary scoping process, inter alia, to: (1) determine the scope and the significant issues to be analyzed in depth in the draft EIS; (2) identify and eliminate insignificant issues from consideration; (3) identify other environmental review and consultation requirements; and (4) indicate the relationship between the timing of the preparation of environmental

¹⁰². CEQ regulations, *supra* note 3, § 1501.7.

¹⁰³. See generally, AR 200-2, *supra* note 5, paras. 7-2 - 7-5.

analyses and the installation's tentative planning and decisionmaking schedule.¹⁰⁴

AR 200-2, ¶ 7-5, incorporates these CEQ provisions. The scope used in the preparation of the draft EIS consists of the determinations made by the installation during and after the receipt of input from participants and interested parties in the scoping process as follows:

- (1) The scope and analysis in the [EIS]. To determine the scope of [EISs], the proponent will consider three types of actions, alternatives, and impacts. . . .
- (2) The three types of **actions** are as follows . . . connected actions . . . cumulative actions . . . similar actions. . . . The three **alternatives** are as follows . . . no action . . . other reasonable courses of action . . . mitigation measures (not in the proposed action). . . . The three types of **impacts** are as follows . . . direct . . . indirect . . . cumulative. . . .
- (3) Identification and elimination from detailed study of issues that are not significant or have been covered by prior environmental review. This narrows the discussion of these issues to a brief presentation of why they will not have a significant impact on the human environment. . . .
- (8) Identification of any other environmental review and consulting requirements so the [installation] may prepare. . . other required analysis and studies concurrently with the environmental impact statement. . . .

This provision also requires the installation to clearly convey all determinations reached during the scoping process to the preparers of the draft EIS in a Scope of Statement.¹⁰⁵ Installations must also make the Scope of Statement available to participants in the scoping process and to other interested

¹⁰⁴. CEQ regulations, *supra* note 3, § 1501.7.

¹⁰⁵. AR 200-2, *supra* note 5, para. 7-5(c).

parties at request. This provision also requires the installation to discuss in the draft EIS any conflicts on issues of a scientific or technical nature that arise between the participants and interested parties.

Once the scoping process is completed, the installation is ready to begin the process of preparing the draft EIS. With regard to the draft statement, the CEQ regulations provide the following:

Draft EISs shall be prepared in accordance with the scope decided upon in the scoping process. . . . The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of [NEPA]. . . . [DA] shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.¹⁰⁶

Appendix D, AR 200-2, sets forth the required contents for EISs -- including draft, final and supplemental. As required by the CEQ regulations, the contents fulfill and satisfy the requirements established by Section 102(2)(C) of NEPA. The contents include the following: (1) cover sheet; (2) summary; (3) table of contents; (4) separate sections that identify the purpose and need for the action, alternatives considered, affected environment, environmental and socioeconomic consequences; (5) list of preparers; (6) distribution list; (7) index; and (8) appendices.

¹⁰⁶. CEQ regulations, *supra* note 3, § 1502.9(a).

AR 200-2, ¶ D-1, sets forth the requirements for the cover sheet and references an example cover sheet. The cover sheet provides, inter alia, a list of agencies responsible for the EIS (i.e., the installation and cooperating agencies such as the U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency), a designation of the statement as a draft, final, or draft or final supplement, and a one-paragraph abstract of the statement that should describe only the need for the proposed action, alternative actions, and the significant environmental consequences of the proposed action and alternatives.¹⁰⁷

AR 200-2, ¶ D-2, sets forth the requirements for the summary. In the summary, the installation, inter alia, must do the following: (1) stress the major conclusions of the environmental analysis; (2) address areas of controversy; and (3) cover issues yet to be resolved; (4) list all Federal permits, licenses, and other entitlements that must be secured prior to implementing construction; and (5) include a statement of compliance with the requirements of other Federal environmental protection laws.¹⁰⁸

AR 200-2, ¶ D-4, sets forth the requirements for drafting the section that identifies the purpose of and need for the construction. The installation should clearly state the reason why the construction is needed and discuss how the

¹⁰⁷. AR 200-2, *supra* note 5, p. 31.

¹⁰⁸. AR 200-2, *supra* note 5, p. 31.

proposed construction or range of alternatives would solve the problem. Additionally, the installation must briefly give the relevant background information on the proposed construction and summarize its operational, social, economic, and environmental objectives.¹⁰⁹

AR 200-2, ¶ D-5, sets forth the requirements for drafting the section that identifies the alternatives considered in the statement. This section presents all reasonable alternatives to the proposed action and associated environmental impacts and should be written "in simple, nontechnical language for the lay reader." The installation must present all environmental impacts of the proposed and alternative actions in comparative form. Additionally, in pertinent part, it requires a "description" of the mitigation measures nominated for incorporation into the proposed action and alternatives.

AR 200-2, ¶ D-6, sets forth the requirements for drafting the section that identifies the existing environmental conditions in the affected area of the proposed project. The installation must address all affected environments, e.g., land, water, historic, cultural, etc., and should discuss them in relation to the significance and magnitude of expected impacts.

AR 200-2, ¶ D-7, sets forth the requirements for drafting the section that identifies the environmental and socioeconomic consequences of the proposed project. The

¹⁰⁹. AR 200-2, *supra* note 5, p. 31.

installation must include, inter alia, discussions of direct and indirect effects on human health and welfare, possible conflicts with Federal, State, etc., land use plans, policies and controls, impacts on the short-term uses and long-term productivity of the environment. Additionally, the installation must address mitigation measures to avert adverse environmental impact.

AR 200-2, ¶¶ D-8 through D-9, respectively, require the installation to list the names of preparers, provide a distribution list of the statement and comments, and include an index and appendices, if any.

Although AR 200-2, Appendix D, prescribes the content of EISSs, it does not provide drafters with a practical guide on how to conduct the analysis. However, two other sources do, i.e., Technical Report N-130, Procedures for Environmental Impact Analysis and Planning;¹¹⁰ and DA Pamphlet 200-1, Handbook for Environmental Impact Analysis.¹¹¹

Technical Report N-130, includes sections on the environmental analysis process, environmental evaluation and decisionmaking, documentation procedures, impact prediction methods, developing and monitoring a mitigation program, and

¹¹⁰. TECHNICAL REPORT N-130, *supra* note 10.

¹¹¹ DA PAMPHLET 200-1, *supra* note 9.

example forms. Additionally, it provides an excellent list of NEPA references.¹¹²

DA Pam 200-1, is a good source for Judge Advocates to use in order to understand how to prepare an EIS for a construction project.¹¹³ The section entitled, "Step-By-Step Preparation" instructs users how to prepare the statement in accordance with the CEQ regulations.¹¹⁴ Additionally, it contains an entire appendix devoted to identifying 46 attributes of the environment and their associated characteristics.¹¹⁵ It places the environmental attributes into one of the following categories: air, water, land, ecology, sound, human and economic (for a breakdown, see the excerpt at Appendix A of this thesis).

Moreover, it provides the following information with respect to each attribute: definition, Army activities (including construction activities) that affect each, source of effects, variables to be measured, evaluation and interpretation of data, special conditions, geographic and temporal effects, mitigation of impact, other comments,

¹¹². TECHNICAL REPORT N-130, *supra* note 10, pp. 145-148.

¹¹³. DA PAMPHLET 200-1, *supra* note 9. Another beneficial source, although it was not published specifically for construction, is the DEP'T OF ARMY, BASE REALIGNMENT AND CLOSURE MANUAL FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT (Sep. 1995). For information on this manual telephone the Army Base Realignment and Closure Office, ATTN: Ms. Barbara Anderson at (703) 693-3501.

¹¹⁴. DA PAMPHLET 200-1, *supra* note 9, p. 14.

¹¹⁵. DA PAMPHLET 200-1, *supra* note 9, app. A.

references to sources of scientific information. For each of the attributes, the appendix identifies how construction activities may effect them.

Most importantly, DA Pam 200-1 contains a section devoted to construction. This section provides a list of the construction activities normally involved in a project and informs the reader how to use a suggested impact worksheet -- a matrix with the 46 environmental attributes across the horizontal axis and the construction activities down the vertical axis -- to assist in the identification of impacts for which baseline data must be collected and analyzed for significant impact.¹¹⁶

This section contemplates that the preparer will create a separate impact worksheet and collect, quantify, and analyze environmental baseline data for the proposed preferred and alternative actions. Subsequently, it contemplates that the preparer will use the impact worksheet as a tool to record the results of the analysis, i.e., if there is a potential negative impact, the placement of an (X) at the intersection of the given construction activity/attribute, if a positive potential impact, the placement of an encircled (+) sign at the intersection, if no potential impact, the intersection is left blank.

Once completed, the construction section contemplates the preparer summing the columns for each environmental attribute

¹¹⁶. DA PAMPHLET 200-1, supra note 9, p. 33.

and recording the result on an attribute-by-attribute basis on a suggested form called a "Summary of Impacts" (See Appendix B for an excerpt). Using the key indicated on the form, the preparer indicates whether the environmental effect on each attribute will either have no significant impact, a moderate impact, or a significant impact. Once preparers have completed both an impact analysis worksheet and an impact summary sheet for the proposed preferred and alternative actions, they will have tremendous aids in preparing the draft EIS; especially the sections that pertain to alternatives considered, affected environment, and environmental consequences.

After the preparation of the draft EIS, but before preparing the final statement, the CEQ regulations, as mandated by NEPA, require Federal agencies to obtain and receive comments from certain entities and persons.¹¹⁷ Federal agencies must obtain comments from any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact. Federal agencies must request comments from appropriate State and local agencies which are authorized to develop and enforce environmental standards, Indian tribes if the action may affect a reservation, any agency which has requested that it receive statements on actions of the kind proposed, and the public.

¹¹⁷. CEQ regulations, *supra* note 8, § 1503.1.

AR 200-2, ¶ 6-5(e) incorporates these requirements. However, prior to obtaining or requesting comments, the installation must forward a "preliminary" draft statement to HQDA for circulation to various offices for review and comment. Subsequently, the draft statement is returned for any revisions and again forwarded to HQDA for final review and approval by the Deputy for Environment, Safety, and Occupational Health (hereinafter, DESOH).¹¹⁸ At the same time, a "notice of availability," a proposed news release and an EPA filing letter are drafted for signature by the DESOH. Upon approval, a copy of the draft statement is filed with the EPA.¹¹⁹ The distribution list includes Federal, State, regional, and local agencies, private citizens and local organizations, interested Congressional delegations, governors, national environmental organizations, the DOD and Federal agency headquarters, and other selected entities.

Once comments are received, Federal agencies may complete the final EIS. The CEQ regulations require Federal agencies to assess and consider comments both individually and collectively and respond to them in the final EIS. Possible responses include the following: (1) modifying the proposed preferred action or alternative actions; (2) developing and evaluating alternatives not previously given serious consideration; (3) supplementing, improving or modifying the

¹¹⁸. AR 200-2, *supra* note 5, para. 6-5(d).

¹¹⁹. CEQ regulations, *supra* note 3, § 1506.9.

analyses; (4) making factual corrections; or (5) by explaining why the comments do not warrant further response, including the underlying rationale and citation to sources and authorities.¹²⁰

Unlike the incorporation of many other provisions of the CEQ regulation, AR 200-2 does not incorporate nearly the entire verbiage of the comment provisions. Rather, AR 200-2, ¶ 6-5(f) briefly provides as follows:

Response to comments. Incorporate responses to comments in the [draft EIS] by modification of the text and/or written explanation. Where possible group similar comments for a common response. The preparer or higher authority may make individual response, if considered desirable.

Once the comments are incorporated into the draft EIS, AR 200-2 requires the generation of the final EIS. The procedure for processing the final statement is essentially the same as process for the draft statement. The notice of availability and final statement must be filed with the EPA for publication in the Federal Register.¹²¹

d. Decisionmaking Procedures

After the final EIS is published in the Federal Register, The CEQ Regulations require Federal agencies to circulate the final EIS, along with the comments and responses thereto, through existing agency review processes.¹²² The procedures

¹²⁰. CEQ regulations, *supra* note 3, § 1503.4.

¹²¹. AR 200-2, *supra* note 5, para. 6-5(g).

¹²². CEQ regulations, *supra* note 3, § 1505.1.

prescribed by AR 200-2, ¶ 6-5(h), prohibit a decisionmaker from making a decision until either the later of 30 days after the EPA has published the notice of availability of the final EIS in the Federal Register, or 90 days after the EPA has published the notice of availability of the draft EIS in the Federal Register.

The CEQ regulations call for the agency to issue its decision in the form of a concise public "record of decision."¹²³ The CEQ regulations require this document to state what the decision was; identify all alternatives considered in reaching the decision and specifying which alternatives were preferable; and state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why not. Additionally, if the preferred alternative includes mitigation measures, Federal agencies must adopt a monitoring and enforcing program. AR 200-2, ¶ 6-5(i), incorporates these requirements.

Finally, after the record of decision is issued, the CEQ regulations permit the Federal agency to implement the decision, i.e., take its preferred action. However, if the agency has committed to mitigation measures in the decision, its duties under NEPA are not yet complete. The CEQ regulations require the agency to ensure that mitigation

¹²³. CEQ regulations, *supra* note 3, § 1505.2.

measures are implemented.¹²⁴ AR 200-2, ¶ 6-5(1) incorporates these requirements. It requires the proponent, usually DPW, to implement the mitigation plan and make available to the public, upon request, the status and results of the mitigation measures. Additionally, this provision refers the reader to AR 200-2, Appendix F, which informs the reader, in pertinent part, how to implement and enforce a mitigation monitoring program.¹²⁵

Continuing with the aforementioned mental checklist, Judge Advocates advising persons responsible for the NEPA process must recognize that the next items in the NEPA mental checklist are, sequentially: (1) publication of the notice of intent to prepare an EIS; (2) scoping to determine which environmental effects will be studied for significant impact; (3) the preparation of a draft EIS; (4) the circulation of the draft EIS for comments; (5) the preparation of the final EIS; (6) publication of the notice of availability of the final EIS: and, finally, (7) the issuance of the record of decision.

Judge Advocates advising either NEPA persons responsible for the NEPA process or procurement personnel should be aware that a problem exists with respect to preparing the record of decision.¹²⁶ Installation commanders are responsible for the preparing the record of decision. Currently, installation

¹²⁴. CEQ regulations, *supra* note 3, § 1505.3.

¹²⁵. AR 200-2, *supra* note 5, paras. F-3 - F-6.

¹²⁶. Julius interview, *supra* note 77.

commanders are not setting forth enough detail in the record of decision to enable contracting officers to reduce the contents into specific contract requirements. For example, as with the problem connected with FONSI's, this problem is manifested in installation commanders generically describing mitigation measures. Installation commanders state that mitigation implementing measures will be used but do not address how they should be implemented. As such, contracting officers lack sufficient detail to reduce the generic mitigation implementing measures into specific contract requirements.

In such situations, as with the problem with the FONSI, the contracting office must reconstruct what the installation commander intended. This may prove difficult. As explained in the "Construction Programming" section below, between the time the commander elects to build a facility and completes the associated NEPA process, and the time a project is programmed, at a minimum, five years have passed. During this time period, memories fade with respect to matters coordinated with Federal, State and local agencies, and, due to military assignment cycles and civilian employee mobility, the installation commander and other personnel who worked on the record of decision. As such, at a minimum, the project will be delayed pending the contracting officer's reconstruction efforts.

In order to solve this problem, Judge Advocates should review the record of decision along with the contracting officer prior to installation commanders signing the record of decision. This way, there should be no problem translating the matters contained in the record of decision to specific contract requirements.

As with a FONSI, Judge Advocates must ensure both that the implementing measures are properly reduced into specific contract provisions and that the contracting officer does not approve any contract modification inconsistent with the record of decisions. As an added measure to avoid these problems, Judge Advocates might suggest to the contracting officer that a copy of the record of decision itself be attached to contract and incorporated by reference.

Additionally, should a circumstance arise in which it is discovered that the project will cause significant impacts not addressed in the record of decision, Judge Advocates must advise the contracting officer that work on the project must be suspended pending the conduct of further NEPA analysis. Judge Advocates, as in the case of a FONSI, in order to shift the risk of additional cost resulting from such a circumstance (i.e., to either avoid or reduce any contractor claim for delay damages), might suggest to the contracting officer that a contract clause be drafted with the following language:

The mitigation measures set forth in [Specification X] [Statement of Work, Section X] were derived from the record of decision attached as Appendix X and prepared pursuant to the National Environmental

Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (hereinafter, NEPA]. The Contractor agrees to not hold the Government responsible for any reasonable period of delay caused by the discovery of any additional environmental impacts that are not addressed in the record of decision and were not reasonably foreseeable prior to contract award. If such a circumstance arises, the Government agrees to pay the Contractor reasonable costs for the demobilization and remobilization of its workforce to the contract site. The contractor agrees that any delay shall be treated as a Suspension of Work pursuant to FAR 52.249-10.

V. NEPA and Army Construction Planning and Programming

a. Decisionmaking Hierarchy

The above sections have highlighted the fact that while the installation is both planning and deciding upon a construction project, it must follow the NEPA process. This includes identifying environmental values and amenities, gathering environmental data on environmental attributes, identifying alternative actions, analyzing the effect of the alternative actions on the environment, identifying mitigation measures, documenting the results, reviewing the document in the agency review process, issuing a decision, implementing the decision and monitoring any mitigation measures, all, essentially, with public notice and input.

AR 200-2 requires MACOMs to circulate and review environmental documents at the same time with construction planning and programming documents.¹²⁷ Therefore, for an understanding of how to integrate the NEPA process into construction planning and programming it is important to

¹²⁷. AR 200-2, *supra* note 5, para. 1-4(j).

understand the construction planning and programming decisionmaking structure.

The National Command Authority (i.e., President and Secretary of Defense) establishes our national security objectives. The Secretary of Defense (hereinafter, SECDEF) and the Joint Chiefs of Staff translate these objectives into a mission statement for DA and the other military departments. DA in turn sets forth a mission statement for each installation. Each installation, in turn, determines its requirements (manpower, equipment, facilities, etc.) to meet the mission statement.

Obviously, at some point, an installation commander will need to build new facilities, or repair or renovate old facilities, in order to meet ongoing mission requirements. Once a need is identified, a construction project must be planned, designed, funded, built, and in situations involving mitigation measures, monitored. This entire process is a joint effort of the installation, the U.S. Corps of Engineers, the MACOM, HQDA (Office of the Secretary of the Army and Army Staff), the Office of Management and Budget, and Congress. The diagram provided below illustrates, in simplified form, this process and the general role that each participant in the process plays.

Contracting)	Installation-----COE District Office (Planning) (Designing,
"	"

	"	COE Division Office
	"	"
	"	"
	MACOM-----	COE
	(MACOM Programming)	
	"	
	"	
	OSA-----HQDA-----	Army Staff
	(DA Programming)	
	"	
	"	
	"	
	OMB-----DOD-----	Congress
(Submits)	(Submits)	(Authorizes and
Appropriates)		(Funds)

The installation is responsible for planning the construction project as provided by AR 210-20, Master Planning for Army Installations.¹²⁸ The U.S. Corps of Engineers is responsible for designing the construction project as set forth in AR 415-18, Military Construction Responsibilities.¹²⁹ MACOMs and HQDA, with the assistance of the installations, are responsible for the programming of a construction project pursuant to AR 415-15, Army Military Construction Program Development and Execution.¹³⁰ DOD and OMB submit the programmed construction to Congress which authorizes and funds the project. Once this is completed, the U.S. Corps of Engineers drafts the contract, issues the solicitation, awards the contract and administers the construction of the building.

¹²⁸. AR 210-20, *supra* note 6.

¹²⁹. AR 415-18, *supra* note 23.

¹³⁰. AR 415-15, *supra* note 1 (C6, 15 Aug. 1994).

b. Construction Planning.

Absent exigent circumstances, all planned construction projects must be incorporated into an Installation Master Plan. AR 200-2 references this plan in informing planners how to achieve the goal of integrating environmental reviews with Army planning:

To achieve [the goal of integrating environmental reviews with Army planning], proponents should provide complete environmental documents for early inclusion with any recommendation or report to decisionmakers ([Installation] Master Plan, . . .). The same documents will be forwarded to the planners, designers, and/or implementers so that recommendations and mitigations on which the decision was based may be carried out.¹³¹

The Installation Master Plan is the official statement of the installation's long range development plans (beyond five years). The Capital Improvement Program, prepared as an adjunct to this plan, is the official statement of the installation's short range plans (immediate five years). Both the Installation Master Plan and the Capital Improvement Program are prepared under the direction of an installation planning board. Membership includes the installation commander or representative, the MACOM commander or representative, commanders from each major Army subordinate command or representative, commanders from each major tenant unit, agency sponsor and activity, and the installation master planner.

¹³¹. AR 200-2, *supra* note 5, para. 2-6.

The Installation Master Plan is a compilation of a number of component plans and maps, a Future Development Site Map and an attached Project Phasing Map which is generated pursuant to the Capital Improvement Program. The component plans and maps cover such topics as natural resources, environmental protection, installation vicinity and layout, airfield and range operations, land use, transportation, utilities, future development and capital improvement (See tables at Appendix C for example contents).

From a construction planning standpoint, the primary components are the Future Development Plan, which identifies the buildings that an installation plans to construct beyond the immediate five years (long-range plans), and the capital improvement program, which identifies the buildings that an installation plans to build in the immediate five years (short-range plans).

The Future Development Site Map is the ultimate product of the Future Development Plan. This map pinpoints the specific sites where the installation plans to construct buildings beyond the immediate five-year period. The Project Phasing Map is the ultimate product of the Capital Improvement Program. This map pinpoints the specific sites where the installation plans to construct buildings in the immediate five-year period.

The Future Development Plan consists, inter alia, of a Master Plan Report which includes diagrams that depict, and a

narrative that supports, the installation's long-range plans for the development of land and supporting transportation and utility systems. The installation develops this plan in accordance with the procedures set forth in TM 5-803-1.¹³²

The development of the Future Development Plan includes a logical series of sequential steps. These steps included the following: (1) gathering and analyzing off- and on-post data to establish limitations on future land use; (2) analyzing mission requirements to determine what facilities will be needed in the future; (3) developing a Concept Plan that identify and graphically depict, from a functional and spacial relationship standpoint, the general area where existing buildings are located and where future buildings and any supporting transportation and utility systems should be built (e.g., a new barracks should be located in the general vicinity of the existing barracks but away from impact areas yet close to shopping areas); and (4) the development of long-range plans which refine the concept plan to form the future Land Use, Transportation and Utility Plans, whose diagrams, respectively, show specific existing building areas and specific areas for future construction (without pinpointing specific building locations), existing and future roadways and utility systems.

To develop the Future Development Plan, the installation must follow a logical series of steps designed to ensure that

¹³². TM 5-803-1, *supra* note 21.

building sites are pinpointed only after current and future land use restrictions are identified and considered current and proposed transportation and utility systems are identified and considered, and the NEPA process has been followed.¹³³

TM 5-803-1 identifies the logical series of steps that must followed to develop the Future Development Plan (See Appendix D, this thesis, p. D-1, for a graphic illustration). The installation begins the process by collecting data from all the component plans and maps and off-post and on-post sources.¹³⁴ Off-post sources include entities such as the following: Federal agencies (e.g., Environmental Protection Agency, Soil Conservation Service), State and County Departments (e.g. Natural Resources and Conservation, Planning and Community Affairs), local government offices (public works, public health) and other local agencies (e.g., regional planing agency, chamber of commerce).

After gathering the data, the installation is able to generate a Regional Setting Map¹³⁵ (which shows the outstanding characteristics of the area 100 square miles surrounding the installation), Vicinity Map¹³⁶ (which depicts the vicinity between one to two miles from the installation boundaries) and

¹³³. AR 210-20, *supra* note 6, para. 4-7(b); TM 5-803-1, *supra* note 21, para. 1-3(2).

¹³⁴. TM 5-803-1, *supra* note 21, ch. 2.

¹³⁵. TM 5-803-1, *supra* note 21, para. 2-5 (a).

¹³⁶. TM 5-803-1, *supra* note 21, para. 2-5(b).

Community Land Use Map,¹³⁷ (which show the patterns of existing and projected land use patterns).

Together these maps provide the installation with a portrayal of the major off-post factors that could affect future construction planning; such factors include the following: State boundaries, major highways, waterways, commercial airports, city limits, and existing and planned industrial, and urban and suburban areas.¹³⁸ The installation must include these maps along with a narrative of the applicable features in the Master Plan Report (See Appendix D, this thesis, pp. D-2 - D-4, respectively, for graphic illustrations).

Installations gather on-post data from the facility development contributing plans and maps, existing conditions maps, and from such data sources as installation directorates, offices and tenant units.¹³⁹ TM-508-3 provides that installations should gather and analyze data on the following items to determine their effect on future development: (1) the natural environment (geology, soils, topography, hydrology, vegetation and wildlife);¹⁴⁰ (2) human environment (historic, archaeological, current and forecasted military/civilian populations, and military medical, dental,

¹³⁷. TM 5-803-1, *supra* note 21, para. 2-8.

¹³⁸. TM 5-803-1, *supra* note 21, para. 2-8.

¹³⁹. TM 5-803-1, *supra* note 21, para. 2-12.

¹⁴⁰. TM 5-803-1, *supra* note 21, para. 2-13.

education, and recreation, and training facilities);¹⁴¹ and (3) safety and health (air operations, explosives storage and handling, outdoor ranges, hazardous material, air quality, water quality, noise abatement, radiation safety).¹⁴²

Additionally, the installation must collect and analyze data on the relationships between land use, transportation capabilities and utility system capabilities. The land use analysis provides an overview of the land use patterns on the installation broken down into categories such as built-up areas, training areas, recreation areas, available land areas, etc. and shows their spatial relationship. The installation is required to graphically depict these areas and their spatial relationships on a diagram called, the Existing Land Use Pattern Diagram (See Appendix D, this thesis, p. D-5, for a graphic illustration) and include it along with a narrative in the Master Plan Report.¹⁴³ The transportation system must be analyzed in order to determine if the existing road network (primary, secondary and tertiary roads) is functionally related to the land use patterns; and to identify potential constraints imposed on future construction due to the location of the existing roadways. The installation must generate a diagram that depicts the transportation system and include it, along with a narrative, in the Master Plan Report (See

¹⁴¹. TM 5-803-1, *supra* note 21, para. 2-14.

¹⁴². TM 5-803-1, *supra* note 21, para. 2-15.

¹⁴³. TM 5-803-1, *supra* note 21, para. 2-16.

Appendix D, this thesis, p. D-6, for a graphic illustration).¹⁴⁴ Likewise, the existing utility systems must be analyzed in light of the land use pattern to determine whether they can support future construction.¹⁴⁵

Once the installation completes both off- and on-post data collection and analysis, the installation will have the baseline data necessary to identify any factors that place limits on future construction. TM-508-3 requires installations to use this data to identify all specific conditions that limit future construction for inclusion in the Master Plan Report.¹⁴⁶ As an adjunct to this analysis, the installation must create a map that depicts these limitations. This map, called the Buildable Area Map, portrays buildable and unbuildable areas on the installation and must be included in the Master Plan Report (See Appendix D, this thesis, p. D-7, for a graphic illustration).

After completing the Buildable Area Map, the installation must conduct a mission analysis to determine if the current and planned facilities meet current mission requirements, and, if not, what additional facilities should be planned for and where, from a functional standpoint, they should be placed. For example, if mission requirements include the addition of a brigade, the installation must plan for the construction of

¹⁴⁴. TM 5-803-1, *supra* note 21, para. 2-16(b).

¹⁴⁵. TM 5-803-1, *supra* note 21, para. 2-16(c).

¹⁴⁶. TM 5-803-1, *supra* note 21, para. 2-17.

additional barracks and ideally, from a functional standpoint, plan to build them next to existing barracks and close to shopping areas but at a distance from any impact area.

TM-508-3 requires installations to determine the ideal functional arrangement for all installation activities and prepare a diagram that reflects this arrangement. This diagram and the underlying rationale for selecting the depicted functional arrangement must be included in the Master Plan Report¹⁴⁷ (See Appendix D, this thesis, p. D-8, for a graphic illustration).

Once data has been collected and analyzed, limitations on future land development have been identified and graphically depicted in the Land Use and Transportation Plan diagrams and the Buildable Area Map, and the mission analysis has been completed and graphically depicted in a Functional Arrangement diagram, the installation is prepared to develop its "Concept Plan" -- the preferred concept selected from alternate concept plans.

The Concept Plan is developed primarily through a study of the Buildable Area Map, the Functional Arrangement Diagram and future facility construction requirements gleaned from the mission analysis. The installation synthesizes these products to create an "Existing Spacial Relationship Diagram," which depicts the existing functional areas and their spacial relationship (See Appendix D, this thesis, p. D-9, for a

¹⁴⁷. TM 5-803-1, *supra* note 21, p. 2-26.

graphic illustration).¹⁴⁸ Subsequently, the installation forms a generalized long-range development plan for the installation functional land use areas, major roadways and utility systems. As a part of this process, the installation generates various alternate conceptual configurations for the functional land use areas, major roadways and utility systems. These conceptual configurations will be derived from the Existing Spatial Relationship Diagram and tempered both by the limitations of off-post and on-post environments and by the existing facility locations.¹⁴⁹

The installation selects the Concept Plan by comparing the advantages and disadvantages of each alternative configuration against each other. Once selected, the installation generates a "Concept Plan Diagram" which graphically portrays the generalized location and spacial relationship of the land use areas (no buildings are specifically sited), depicts the major roadways, railroads and waterways designed to serve the land use arrangement, and illustrate the installation boundaries (See Appendix D, this thesis, p. D-10, for a graphic illustration). The installation must incorporate both the diagram and a narrative

¹⁴⁸. TM 5-803-1, *supra* note 21, para. 3-2.

¹⁴⁹. TM 5-803-1, *supra* note 21, para. 3-6.

explaining the for the selecting the Concept Plan in the Master Plan Report.¹⁵⁰

Once completed, the installation must translate the Concept Plan, a general theoretical framework toward which the installation directs its planning efforts, into specific long-range plans that retain the essential functional and spacial relationships of the Concept Plan.¹⁵¹ Long-range plans provide the guidelines for overall long-term physical growth at the installation. They are comprehensive in that they reflect all the physical systems on post and that they cover the entire installation.

The long-range plans is composed of three interdependent plans which, together, provide the overall framework for the Installation Master Plan. These plans are as follows: a Land Use Plan, a Transportation Plan, and a Utility Service Plan.

In developing the Land Use Plan, the installation refines the Concept Plan to arrange specific land uses in the most desirable configuration. Considerations include such matters as a preference for a compact arrangement of the built-up area, available capacity of the transportation and utility systems to serve high activity land use areas, convenient access to community facilities, and accessibility to primary

¹⁵⁰. TM 5-803-1, *supra* note 21, para. 3-7.

¹⁵¹. TM 5-803-1, *supra* note 21, para. 1-4(b).

roads for land uses generating high traffic volumes, etc.. ¹⁵²

The completed Land Use plan will identify: (1) the specific areas in which current buildings exist or in which proposed buildings with the same function should be built in the future; (2) the sites of existing and proposed utility facilities;

(3) the location of existing and proposed major streets, railroads and waterways; and (4) the specific areas for long-range development. TM-508-3 requires the installation to depict these items in a Land Use Diagram and incorporate it in the Master Plan Report (See Appendix D, this thesis, p. D-11, for a graphic illustration).

In the Transportation Plan, the installation identifies the most desirable system that provides a coordinated and comprehensive system of access for the installation. This plan eludes to existing and proposed roadways to serve the land use pattern identified in the Land Use Diagram. The installation designates roads as either primary, secondary, or tertiary roads based upon the needs served by them in the Land Use Plan.

The installation must include a diagram of the Transportation Plan in the Master Plan Report (See Appendix D, this thesis, p. D-12, for a graphic illustration). This diagram must depict existing roads, railroads and waterways.

¹⁵². TM 5-803-1, *supra* note 21, para. 4-2.

Additionally, it must portray the location and the type of proposed roads and any alteration to the railroad system necessary to accommodate the future development delineated in the Land Use Plan.¹⁵³

In the Utility Service Plan, the installation tailors the conceptual utility plan to the refined needs of the Land Use Plan. The Utility Service Plan is constructed to meet the needs of the installation in the most efficient manner and to accommodate future development. Absent the need to be diagrammed for clarity, the installation need not include a diagram in the Master Plan Report (See Appendix D, this thesis, p. D-13, for a graphic illustration).¹⁵⁴

Once the installation completes the long-range plans for Land Use, Transportation, and Utility Service are finished, it installation must complete one more step in preparing the Master Plan Report. TM 5-803-1 requires the installation to conduct an EA, termed the "Master Plan EA," in accordance with AR 200-2. This EA is for the entirety of the installation and required by AR 210-20¹⁵⁵. Ultimately, once the installation decides to build at a specific site depicted on the Future Development Site Map, it must conduct a separate site-specific

¹⁵³. TM 5-803-1, *supra* note 21, para. 4-4.

¹⁵⁴. TM 5-803-1, *supra* note 21, para. 4-5.

¹⁵⁵. AR 210-20, *supra* note 6, para. 4-7(1).

NEPA analysis prior to incorporating the site on the Project Phasing Map.¹⁵⁶

The Master Plan EA must consist of the following three elements: (1) an analysis of the anticipated environmental impacts of implementation of the long-range plan; (2) identification of appropriate mitigation measures; and (3) documentation of the results of the analysis in the Master Plan Report.¹⁵⁷

With respect to Master Plan EA methodology, TM 5-803-1 states that all of the environmental factors related to the installation and identified by previous data collection and analysis should be re-evaluated in light of the long-range plan. Such evaluation should include the identification of those environmental attributes which are most likely to be sensitive to physical changes on the installation, and the probable short- and long-term effect of Plan implementation on these sensitive attributes. Once the installation has determined the sensitive attributes, it should next determine the severity of the probable impacts on the attributes.¹⁵⁸

If the impacts are significant, the installation should consider mitigation measures. Such measures might include: (1) noise attenuation such as berms, walls, or sunproofing buildings;

¹⁵⁶. TM 5-803-1, *supra* note 21, p. 5-1.

¹⁵⁷. TM 5-803-1, *supra* note 21, para. 5-1.

¹⁵⁸. TM 5-803-1, *supra* note 21, para. 5-2.

(2) special construction techniques to prevent or minimize stormwater or wastewater runoff into receiving streams; (3) landscaping provisions to prevent erosion, provide screening, or enhance natural or cultural assets or vistas; (4) designation of no-development areas to protect archeological sites, endangered species habitat, virgin forests, or wetlands; and (5) identification of the need to conduct more intensive studies prior to plan implementation.¹⁵⁹

With respect to documenting the Master Plan EA, TM 5-803-1 requires installations to use the format prescribed in AR 200-2.¹⁶⁰ In the event of a FONSI, installations are required to briefly explain why the Master Plan will not have a significant effect on the human environment and will not be subject to an EIS.¹⁶¹ If an EIS is required, installations must state in the Master Plan EA why one is needed. However, TM 5-803-1 states that the EIS will be a separate work from the Installation Master Plan.¹⁶²

Once the installation completes the Master Plan Report and Master Plan EA, they are submitted to the MACOM for approval. Upon approval, the installation, through the supporting COE division, prepares the Future Development Site Map. As provided above, but repeated here for convenience,

¹⁵⁹. TM 5-803-1, *supra* note 21, para. 5-2.

¹⁶⁰. TM 5-803-1, *supra* note 21, para. 5-3.

¹⁶¹. TM 5-803-1, *supra* note 21, para. 5-3.

¹⁶². TM 5-803-1, *supra* note 21, para. 5-3.

this map is the vehicle whereby the commander pinpoints the location of planned future construction sites. The map is constructed primarily based upon a synthesis of the future Land Use, Transportation and Utility Plans and Existing Conditions Map.¹⁶³ Every five years, the installation must submit a revised Future Development Plan and Future Development Site Map.¹⁶⁴

Installation commanders convert long-range future construction plans to short-range construction plans via the Capital Improvement Program. This program consists of a list of proposed projects and a Project Phasing Map which, respectively, identify and depict the pinpointed site location of those projects which the installation commander plans to seek approval to be built, on a priority basis, over the immediate five-year period.

Installation commanders annually submit the Capital Improvement Program to the MACOM for approval.¹⁶⁵ In conjunction with this submission, the installation must complete DD Form 1391-EF, FY _ Military Construction Project Data, which is the DOD (and Army) construction project justification document.¹⁶⁶ This form includes a description of the project, the justification and need for the project,

¹⁶³. TM 5-803-1, *supra* note 21, ch. 6.

¹⁶⁴. AR 210-20, *supra* note 6, Table 5-1, p. 10.

¹⁶⁵. AR 210-20, *supra* note 6, para. 5-1(g).

¹⁶⁶. AR 415-15, *supra* note 23, para. I-1, p. 31.

alternatives to the project that were considered, the functional requirements of the facility and the completion of the NEPA process in accordance with AR 200-2.¹⁶⁷

As can be gleaned from the aforementioned, the point of integration of NEPA and Army construction planning is the Installation Master Plan. When the installation is preparing the Future Development Plan and the Capital Improvement Program, Judge Advocates should ensure that it follows the NEPA process when preparing, respectively, the Master Plan EA/EIS and the site specific EA/EIS.

Most importantly, Judge Advocates should ensure that the preparer of the applicable EA or EIS identify the specific steps for implementing mitigation measures. Judge Advocates should involve the contracting officer and consult with technical sources to assist in this effort.

c. Construction Programming

Once the installation submits the Capital Improvement Program, the programming process begins. AR 415-15, Army Military Construction Program Development and Execution,¹⁶⁸ inter alia, prescribes policies, responsibilities and procedures for programmed construction (See tables at Appendix E, this thesis, for types of programmed and non-programmed construction). The programming process commences with the

¹⁶⁷. AR 415-15, *supra* note 1, para. 2-4; TM 5-803-1, *supra* note 21, para. 5-3(c).

¹⁶⁸. AR 415-15, *supra*, note 1 (C6, 15 Aug. 1994).

submission of the Capital Improvement Program and DD Form 1391-EF.¹⁶⁹ Programmed construction is based upon a five year cycle, i.e., guidance year minus one, guidance year, design year, budget year, and program year (project funded).¹⁷⁰

During guidance year minus one, the installation submits the Capital Improvement Program and DD Form 1391-EF in which it identifies and justifies projects and list the projects in order of priority to be built over the immediate five-year period. The MACOM consolidates the prioritized lists from all of its subordinate installations and forwards them to the HQDA Construction Requirements Review Board (hereinafter, CRRB) for consideration in the following year, i.e., guidance year.¹⁷¹

During the guidance year several events occur. MACOMs update their prioritized lists and submit them to the CRRB. Subsequently, the CRRB conducts an annual Project Review Board. At this board, the CRRB reviews, validates, and selects projects for design. Upon selection, the applicable U.S. Corps of Engineer division starts a 35% design which must be completed by August 1, of the following year, i.e., the design year.¹⁷²

¹⁶⁹. AR 415-15, *supra* note 1, para. I-1 (C6, 15 Aug. 1994).

¹⁷⁰. AR 415-15, *supra* note 1, para. 1-5 (C6, 15 Aug. 1994).

¹⁷¹. AR 415-15, *supra* note 1, fig. 1-2, p. 9 (C6, 15 Aug. 1994).

¹⁷². AR 415-15, *supra* note 1, para. 1-5(b)(1) (C6, 15
(continued...)

At the beginning of the design year, DA begins to build for its prioritized project submission to the DOD. Additionally, the project designs proceed to completion. Eventually, DA submits to DOD its prioritized project list in which it selects the projects that will be included in the Army's budget estimate submission. By August 1, the 35% design should be completed.¹⁷³

During the budget year, several activities occur. DA presents each project before DOD, OMB and Congress. During this year the project design is completed.¹⁷⁴ During the program year, Congress authorizes the project and appropriates funds (i.e., funds the project).¹⁷⁵

Judge Advocates must have knowledge of the programming process. Without such knowledge, Judge Advocates who do not understand both the NEPA and procurement processes will be unable to appreciate the length of time that transpires between these processes. Such lack of appreciation may lead to a failure to understand that those involved in preparing EAs or EISS must be specific when addressing matters in these

¹⁷² (...continued)
Aug. 1994).

¹⁷³. AR 415-15, *supra* note 1, para. 1-5(b)(2) (C6, 15 Aug. 1994).

¹⁷⁴. AR 415-15, *supra* note 1, para. 1-5(b)(3) (C6, 15 Aug. 1994).

¹⁷⁵. AR 415-15, *supra* note 1, para. 1-5(b)(4) (C6, 15 Aug. 1994).

documents, especially matters coordinated with outside entities such as State and local agencies.

Absent such specifics, at best, the project will be delayed pending a contracting officer's efforts at reconstructing the details, which may be confounded by attrition of the personnel who prepared these documents due to the military assignment cycle or civilian mobility. In essence, understanding the programming process is the bridge between the planning and procurement processes.

VI. NEPA and FAR Planning

Once a project is authorized and funded, the installation is prepared to begin the contracting process. The Secretary of Defense, the Administrator of General services, and the Administrator of the National Aeronautics and Space Administration jointly prescribe the FAR.¹⁷⁶ The FAR is the single government-wide regulation for use by agencies in their acquisition of construction.¹⁷⁷ Each agency implements or supplements the FAR in their own regulations, which must limit coverage to the specific needs of the agency.¹⁷⁸

The FAR, in pertinent part, sets forth the procedures that agencies must follow to perform acquisition planning.¹⁷⁹ FAR, Part 1, includes a provision that states that acquisition

¹⁷⁶. FAR, *supra* note 8, para. 1.102.

¹⁷⁷. FAR, *supra* note 8, para. 1.101.

¹⁷⁸. FAR, *supra* note 8, para. 1.101.

¹⁷⁹. FAR, *supra* note 8.

planning must fulfill public policy objectives, e.g., NEPA.¹⁸⁰

The FAR defines "acquisition planning" as follows:¹⁸¹

"Acquisition planning" means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.

The FAR requires the agency head or designee to prescribe procedures for preparing written acquisition plans.¹⁸² With respect to the NEPA process, the FAR requires the agency to include in these plans a discussion of the applicability of an EA or EIS, the proposed resolution of environmental issues, and any environmentally-related requirements to be included in solicitations and contracts.¹⁸³ Neither the Department of Defense nor Army FAR Supplements expound upon this provision.

As with the programming process, Judge Advocates must understand the procurement process to be able to avoid the pitfalls during the NEPA process. Additionally, Judge Advocates who understand both the NEPA and procurement processes will avoid NEPA violations by ensuring that contracting officers neither draft contract requirements nor approve any contract modification inconsistent with mitigation measures identified in a FONSI or record of decision.

¹⁸⁰. FAR, *supra* note 8, 1.102-2 (d).

¹⁸¹. FAR, *supra* note 8, para. 7.101.

¹⁸². FAR, *supra* note 8, para. 7.103.

¹⁸³. FAR, *supra* note 8, para. 7.105(b) (15).

VII. Conclusion

NEPA identifies environmental goals and responsibilities for Federal agencies. To ensure that Federal agencies comply with NEPA, Congress set forth action-enforcing mechanisms to ensure that Federal agencies identify and consider environmental values and amenities along with technical and economic factors in their decisionmaking process. The CEQ regulations and AR 200-2, collectively set forth the procedures that DA must follow to comply with NEPA. AR 210-20 and TM 5-803-1 together set forth the procedures that DA must follow when planning construction projects. AR 415-15, prescribes programming procedures for construction projects. FAR, Part 7, sets forth the requirements for acquisition planning.

Unfortunately, neither these authorities nor any other authority may be used as a guide to integrating the NEPA and procurement processes. Although the CEQ regulations and AR 200-2 generally identify what planners and decisionmakers must do to comply with NEPA, neither specifically addresses construction procurement planning and programming. Additionally, although the FAR and the construction planning and programming regulations address construction planning, programming and execution, they merely reference the NEPA process without specifically addressing how NEPA should be integrated. This lack of a single source is a problem.

Judge Advocates must advise officials in both disciplines. In practice, however, many Judge Advocates do not have duty experience with both the NEPA and procurement processes. As a consequence, due the lack of a source integrating the two processes, Judge Advocates cannot provide integrated advice without a substantial research effort. This thesis solves this problem by providing a single source which includes and integrates salient authorities. A summary of this integration follows.

Construction projects are initially conceived from a need to meet mission requirements. In 1987, DA issued AR 210-20, Master Planning for Army Installations, then a new regulation. This regulation required installations to develop both an Installation Master Plan and a Capital Improvement Program. These plans, respectively, represent the official statement of the installation's long- and short-range plans.

Once an Installation Master Plan is developed and approved, AR 210-20 requires the installation to incorporate any newly conceived project into both the Future Development Plan and Future Development Site Map. The installation prepared this plan and map pursuant to TM 5-803-1, Installation Master Planning.

The prescribed procedures required the installation to prepare them in accordance with the following sequential steps: (1) gathering data to determine building limitations; (2) comparing

future mission requirements with existing facilities to determine future construction needs; (3) synthesizing the data, future construction needs and existing condition maps to develop a Concept Plan which depicts -- from a functional and spacial relationship standpoint -- generally how existing and future buildings and supporting transportation and utility systems should be configured; (4) translating the Concept Plan into concrete long-range Land Use, Transportation, and Utility Plans; including diagrams depicting in greater detail (without pinpointing building sites) where existing and future buildings and supporting transportation and utility systems will be located; (5) preparing the Master Plan EA or EIS; (6) the submission of the Master Plan EA and Future Development Plan to the MACOM for approval; and (7) upon approval, creating the Future Development Site Map pinpointing future construction sites.

When incorporating the newly conceived project into the Future Development Plan, the installation must ensure that it fits within the long-range plans. Additionally, the installation must supplement the Master Plan EA. This endeavor will not be difficult as most of the data will be included in the original Master Plan EA.

However, the installation must still follow the NEPA process. NEPA requires action proponents both to conduct an

environmental analysis and to provide the resulting documents to the decisionmaker. In the case of construction, the action proponent is usually DPW and the decisionmaker the installation commander.

Upon completion of the supplemental NEPA analysis, the installation must forward the applicable NEPA document and revised Future Development Plan to the MACOM for approval. Upon approval, the installation must revise the Future Development Site Map by pinpointing the site of the newly conceived project.

As a part of this process, TM 5-803-1 requires the installation to conduct a site specific EA, if required. The installation should first consult AR 200-2 to determine whether the newly conceived project is eligible for a CATEX. If so, the installation must generate a REC. Once done it site the project on the Future Development Site Map.

If ineligible for a CATEX, the installation should consult AR 200-2 to determine whether the project fits within the list of typical classes of actions that normally require an EA. If so, the installation should proceed with the EA. If not, the installation should consult AR 200-2 to determine whether the project fits within the list of typical classes of actions that normally require an EIS.

If the project fits within this list, the installation should proceed with the EIS. If not, the installation must conduct an EA to determine whether an EIS is required. If the

EA reveals that the project will not significantly impact the environment, the installation must issue a FONSI.

Subsequently,

the installation may site the project on the Future Development Site Map.

If the EA reveals that the project will significantly impact the environment, the installation must proceed with the preparation of the EIS. Upon completion, the installation may site the project on the Future Development Site Map.

Once the installation sites the project on the Future Development Site Map, the project remains a part of the installation's long-range plan (beyond five years) until mission requirements dictate that it be transferred to the installation's short-range plan (immediate five years). The vehicle the installation uses to transfer the project to the short-range plan is the Capital Improvement Program.

AR 210-20 requires the installation to submit this program annually. The Capital Improvement Program includes both the installation's prioritized list of projects and the Project Phasing Map -- which depicts the pinpoint location of the prioritized projects. Additionally, the Capital Improvement Program includes DD Form 1391-EF. Installations must attach all applicable NEPA documents to this form, i.e., either the EA and FONSI, or the EIS and record of decision.

Upon submission of the Capital Improvement Program, the five-year programming process commences and includes: (1) the

guidance year minus one, in which the installation identifies the project; (2) the guidance year, in which the CRRB selects projects for 35% design; (3) the design year, in which the 35% design must be completed; (4) the budget year, in which the design is completed and DA presents the project for funding to DOD, OMB and Congress; and (5) the program year, in which the project is authorized and funded.

Upon completion of the programming process, installation procurement planners complete the written acquisition plan. Thereafter, the contracting officer prepares and issues the contract solicitation documents. Subsequently, the contracting officer awards and administers the contract.

Judge Advocates, after reading both this thesis and the referenced authorities, should find it less difficult and time consuming to integrate the NEPA and procurement processes. Consequently, they will be in a better position to provide contracting officers more complete advice. Judge Advocates who understand both the NEPA and procurement processes can prevent contracting officers from making mistakes during contract formation and administration, e.g., ensuring that contracting officers neither draft contract requirements nor approve any contract modification inconsistent with mitigation measures identified in a FONSI or record of decision.

Moreover, Judge Advocates, who have a working knowledge of the interrelationship of the NEPA and procurement processes, will be able to appreciate the potential NEPA

related contract administration problems that may arise. As such, they will be in a position to recommend prophylactic measures designed to avoid them (i.e., incorporating the FONSI or record of decision into the contract; including a risk shifting clause to avoid delay damages caused by unforeseen significant impacts).

In addition to the aforementioned problem, I have identified in this thesis the various problems that are caused by those involved in the NEPA process failing to appreciate that the importance of detail in NEPA documents. One problem is with the "hypothetical" thesis. This problem arises when those preparing an EA or EIS use implementing measures that are technically infeasible. As such, the installation is technically in violation of NEPA which requires Federal agencies to take a hard look at environmental impacts. The other problems are based upon a lack of coordination between those conducting the NEPA process and the contracting office.

All of the above problems may be solved if the contracting officer is involved in the NEPA process in the form of reviewing any applicable mitigation measures. Additionally, these problems may be solved if Judge Advocates, who understand both the NEPA and procurement processes, are involved and ensure that contracting officers and technical experts are involved in the review of the applicable mitigation measures.